Nos. 05-7058 and 05-7142

Supreme Court, U.S.
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In The
Supreme Court of the United States

LORENZO L. JONES,

Petitioner,

v.

BARBARA BOCK, *et al.*,

Respondents.

TIMOTHY WILLIAMS,

Petitioner,

v.

WILLIAM OVERTON, *et al.*,

Respondents.

JOHN H. WALTON,

Petitioner,

v.

BARBARA BOUCHARD, *et al.*,

Respondents.

On Writs Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF FOR THE PETITIONERS

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QUESTIONS PRESENTED

1. Whether satisfaction of the PLRA's exhaustion requirement is a prerequisite to a prisoner's federal civil rights suit such that the prisoner must allege in his complaint how he exhausted his administrative remedies (or attach proof of exhaustion to the complaint), or instead, whether non-exhaustion is an affirmative defense that must be pleaded and proven by the defense. (**No. 05-7058 only**)

2. Whether the PLRA requires a prisoner to name a particular defendant in his or her administrative grievance in order to exhaust his or her administrative remedies as to that defendant and to preserve his or her right to sue them. (**No. 05-7142 only**)

3. Whether the PLRA prescribes a "total exhaustion" rule that requires a federal district court to dismiss a prisoner's federal civil rights complaint for failure to exhaust administrative remedies whenever there is a single unexhausted claim, despite the presence of other exhausted claims. (**No. 05-7058 and No. 05-7142**)

LIST OF PARTIES TO THE PROCEEDINGS

Jones **(No. 05-7058)**: Barbara Bock (named in the caption), Valerie A. Chaplin, Paul Morrison, and Michael Opanasenko were defendants in the district court and appellees in the court of appeals and are respondents here. Janet Konkle and Ahmad Aldabagh were named as defendants but never served and, therefore, did not appear in the district court or court of appeals and are not respondents here.

Williams **(No. 05-7142)**: William Overton (named in the caption), David Jamrog, Mary Jo Pass, Paul Klee, Chad Markwell, and Bonnie Peterson were defendants in the district court and appellees in the court of appeals and are respondents here. George Pramstaller was named as a defendant but never served and, therefore, did not appear in the district court or court of appeals and is not a respondent here.

Walton **(No. 05-7142)**: Barbara Bouchard (named in the caption), Ken Gearin, David L. Bergh, Catherine S. Bauman, Denise Gerth, and Rob Bobo were defendants in the district court and appellees in the court of appeals and are respondents here.

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BRIEF FOR THE PETITIONERS

OPINIONS BELOW

The opinion of the court of appeals in *Jones* (No. 05-7058) (JAI 44-46) is unreported but is *available at* 135 Fed. Appx. 837. The district court's judgment (JAI 43) and order adopting the magistrate judge's report and recommendation (JAI 40-42) and the magistrate judge's report and recommendation (JAI 18-39) itself are all unreported.

The opinion of the court of appeals in *Williams* (No. 05-7142) (JAI 110-16) is unreported but is *available at* 136 Fed. Appx. 859. The district court's judgment (JAI 108-09) and order adopting the magistrate judge's report and recommendation (JAI 106-07) and the magistrate judge's report and recommendation (JAI 76-105) itself are all unreported.

The opinion of the court of appeals in *Walton* (No. 05-7142)[1] (JAI 168-73) is unreported but is *available at* 136 Fed. Appx. 846. The district court's judgment (JAI 167) and order adopting the magistrate judge's report and recommendation (JAI 165-66) and the magistrate judge's report and recommendation (JAI 158-64) itself are all unreported.

JURISDICTION

The judgment of the court of appeals in *Jones* (No. 05-7058) was entered on June 15, 2005. On September 2, 2005, Justice Stevens extended the time within which to file a petition for a writ of certiorari to and including October 13, 2005. The petition for a writ of certiorari was

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[1] *Williams* and *Walton* share the same case number because they were the subject of a joint petition filed pursuant to Supreme Court Rule 12.4.

filed on October 13, 2005. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

The judgment of the court of appeals in *Williams* (No. 05-7142) was entered on June 22, 2005. On September 13, 2005, Justice Stevens extended the time within which to file a petition for a writ of certiorari to and including October 20, 2005. The petition for a writ of certiorari was filed on October 17, 2005. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

The judgment of the court of appeals in *Walton* (No. 05-7142) was entered on June 17, 2005. On September 2, 2005, Justice Stevens extended the time within which to file a petition for a writ of certiorari to and including October 17, 2005. The petition for a writ of certiorari was filed on October 17, 2005. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant portions of the Prison Litigation Reform Act of 1995 (PLRA), 28 U.S.C. 1915A and 42 U.S.C. 1997e, are set forth in an appendix to this brief.

STATEMENT

Before prisoners may challenge in federal court a condition of their confinement, the Prison Litigation Reform Act (PLRA), 42 U.S.C. 1997e, requires prisoners to first exhaust available administrative remedies by pursuing to completion whatever inmate grievance and/or appeal procedures their custodians provide. Petitioners, each in the custody of the Michigan Department of Corrections (MDOC), pursued their grievances at each level of the MDOC's grievance system and received final decisions

denying their grievances. Nonetheless, in these consolidated cases, the court of appeals held that petitioners' federal civil rights complaints must be dismissed in their entirety because they failed to satisfy certain extra-statutory rules that, according to the court of appeals, the PLRA's exhaustion mandate requires. Specifically, the court of appeals held that to satisfy the PLRA's exhaustion requirement, prisoners must (1) either specifically allege in their complaints how and when they exhausted their administrative remedies or attach to their complaints proof of exhaustion, (2) have identified each individual in their initial administrative grievance whom they later name as a defendant in their subsequent civil rights complaints, and (3) not join in their complaints any unexhausted claims or defendants not named in their initial grievances with exhausted claims or defendants, lest their complaints be dismissed in their entirety. Petitioners seek reversal of these holdings.

A. The Prison Litigation Reform Act

Congress enacted the PLRA in 1996 in response to a significant increase in prisoner litigation in the federal courts. *Woodford v. Ngo*, 126 S.Ct. 2378, 2382 (2006). Its goals, as reflected by its supporters and recognized by this Court, were to "reduce the quantity and improve the quality of prisoner suits," *Porter v. Nussle*, 534 U.S. 516, 524 (2002), while not "prevent[ing] inmates from raising legitimate claims," 141 Cong. Rec. S14627 (daily ed. Sep. 29, 1995) (statement of Sen. Hatch).

To accomplish these goals, Congress included "a variety of provisions" in the PLRA, a "centerpiece" of which "is an 'invigorated' exhaustion provision, § 1997e(a)." *Ngo*, 126 S.Ct. at 2382 (quoting *Porter*, 534 U.S. at 524). Before the PLRA's enactment, the requirement that a prisoner exhaust administrative remedies before commencing an

action under 42 U.S.C. 1983 was "in large part discretionary." *Porter*, 534 U.S. at 523. The then-governing statute authorized a district court, if it "believe[d] that such a requirement would be appropriate and in the interests of justice," to stay the prisoner's action for a period not to exceed 180 days while the prisoner exhausted administrative remedies. Civil Rights of Institutionalized Persons Act, Pub. L. No. 96-247, 94 Stat. 352 (1980), as amended, 42 U.S.C. 1997e (1994). The Court described this provision as a "limited exhaustion requirement." *McCarthy v. Madigan*, 503 U.S. 140, 150-51 (1992).

The PLRA's new exhaustion prescription provides that "[n]o action shall be brought with respect to prison conditions * * * by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted." 42 U.S.C. 1997e(a). Under § 1997e(a), "[e]xhaustion is no longer left to the discretion of the district court, but is mandatory"; "a prisoner must now exhaust administrative remedies even where the relief sought * * * cannot be granted by the administrative process"; and "exhaustion of administrative remedies is required for any suit challenging prison conditions, not just for suits under § 1983." *Ngo*, 126 S.Ct. at 2382-83. Moreover, as this Court recently recognized in *Ngo*, when Congress made exhaustion mandatory, it commanded "proper exhaustion * * * which 'means using all steps that the agency holds out, and doing so properly (so that the agency addresses the issues on the merits).'" *Id.* at 2385 (quoting *Pozo v. McCaughtry*, 286 F.3d 1022, 1024 (CA7), cert. denied, 537 U.S. 949 (2002)). According to the Court, Congress' requirement of "proper exhaustion" ensures that, on one hand, prisons have a "fair opportunity to correct their own errors," *id.* at 2388; see also *Porter*, 534 U.S. at 524-25 (holding that exhaustion "afford[s] corrections officials time and opportunity to address complaints

internally before allowing the initiation of a federal case"), and, on the other, that prisoners will have "a meaningful opportunity * * * to raise meritorious grievances" and, if necessary, to seek judicial review, *Ngo*, 126 S.Ct. at 2392.

The PLRA also attempts to accomplish Congress' goals of reducing the quantity and improving the quality of prisoner suits while not barring legitimate claims:

- by limiting the claims a prisoner may bring, see 42 U.S.C. 1997e(e) (barring a prisoner's "Federal civil action * * * for mental or emotional injury suffered while in custody without a prior showing of physical injury"),
- by expediting resolution of prisoner suits, see 28 U.S.C. 1915A(1)(a) (providing for district courts to "review, before docketing, if feasible or, in any event, as soon as practicable after docketing" a prisoner's civil complaint to "identify cognizable claims or dismiss the complaint, or any portion of the complaint, if the complaint – (1) is frivolous, malicious, or fails to state a claim upon which relief may be granted; or (2) seeks monetary relief from a defendant who is immune from such relief"),
- by allowing courts to dismiss "without first requiring the exhaustion of administrative remedies" any "*claim* [that] is, on its face, frivolous, malicious, fails to state a claim upon which relief can be granted, or seeks monetary relief from a defendant who is immune from such relief," 42 U.S.C. 1997e(c)(2) (emphasis added), and
- by allowing a court to dismiss "on its own motion or on the motion of a party * * * any *action* brought with respect to prison conditions * * * if the court is satisfied that the *action* is frivolous, malicious, fails to state a claim upon which relief can be granted, or seeks monetary relief from a

defendant who is immune from such relief," *id.* § 1997e(c)(1) (emphasis added).

B. The Sixth Circuit's Judicial Embellishments of the PLRA's Exhaustion Requirement

The Sixth Circuit has engrafted onto the PLRA's exhaustion requirement a series of procedural trappings that it subsequently used to justify the dismissal of petitioners' complaints. Because the Sixth Circuit affirmed the dismissals of petitioners' complaints in unpublished decisions that simply followed the prior decisions in which it created these judge-made obstacles to merits review, we briefly review the Sixth Circuit's prior decisions here.

1. The "Plead and Show Exhaustion" Rule

Relevant to the first question presented, the Sixth Circuit held in *Brown v. Toombs*, 139 F.3d 1102, 1104 (CA6), cert. denied, 525 U.S. 833 (1998), "that prisoners filing § 1983 cases involving prison conditions must allege and show that they have exhausted all available state administrative remedies. A prisoner should attach to his § 1983 complaint the administrative decision, if it is available, showing the administrative disposition of his complaint." *Brown* further admonished district courts to "enforce th[is] exhaustion requirement *sua sponte* if not raised by the defendant." *Ibid.* In *Knuckles-El v. Toombs*, 215 F.3d 640, 642 (CA6), cert. denied, 531 U.S. 1040 (2000), the court clarified that, if written documentation of exhaustion is unavailable to a PLRA plaintiff at the time they file their complaint, they must "describe with specificity the administrative proceeding and its outcome" to avoid dismissal under *Brown*. And in *Baxter v. Rose*, 305 F.3d 486, 489 (CA6 2002), the court added "that a [PLRA] plaintiff, who fails to make a sufficient allegation of exhaustion in their initial complaint [as

required by *Brown* and *Knuckles-El*,] not be allowed to amend his complaint to cure the defect."

2. The "Name All Defendants" Rule

Relevant to the second question presented, the Sixth Circuit held in *Curry v. Scott*, 249 F.3d 493, 505 (CA6 2001), "that a prisoner [must] file a grievance against the person he ultimately seeks to sue." In *Burton v. Jones*, 321 F.3d 569, 575 (CA6 2003), the court clarified that "for a court to find that a prisoner has administratively exhausted a claim against a particular defendant, a prisoner must have alleged mistreatment or misconduct on the part of the defendant at Step I of the grievance process." In *Thomas v. Woolum*, 337 F.3d 720, 734, 735 (CA6 2003), the court reiterated that prisoners must "file grievances 'against' specific defendants" but indicated that "an inmate need not identify each officer by name when the identities of the particular officers are unknown."

3. The "Total Exhaustion" Rule

Relevant to the third question presented, the Sixth Circuit held in *Jones Bey v. Johnson*, 407 F.3d 801, 805 (CA6 2005), pet. for cert. pending, No. 05-874 (filed Jan. 9, 2006), that "the PLRA's exhaustion requirement applies such that a 'mixed' complaint, alleging both exhausted and unexhausted claims, must be completely dismissed for failure to exhaust administrative remedies."[2]

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[2] The Sixth Circuit recently called into doubt and refused to follow *Jones Bey*. See *Spencer v. Bouchard*, 449 F.3d 721, 726 (CA6 2006); see also *Bell v. Konteh*, 450 F.3d 651, 654 n.5 (CA6 2006). This development does not affect the reviewability of these cases. The judgments of the court of appeals are final, and only this Court can offer petitioners the relief they seek. Moreover, this development does not resolve the

(Continued on following page)

These rules operate cumulatively so that the slightest pleading error may mandate the dismissal of a complaint raising multiple meritorious claims, some or even all of which have in fact been exhausted. Thus, a prisoner who fails to allege with specificity exhaustion against a single defendant will have his entire complaint dismissed with no chance to cure by amendment what may be only a drafting omission or an instance where the prisoner did not have the necessary information at the time of the grievance.

C. Michigan's Prison Grievance System

Michigan has a prison grievance system for prisoners who seek to challenge the conditions of their confinement.

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intractable split among the circuits. The two other circuits with a "total exhaustion" rule have continued to apply it even after *Spencer*. See *Abdul-Muhammad v. Kempker*, 450 F.3d 350, 352 (CA8 2006) ("§ 1997e(a) requires that the inmate exhaust all available prison grievance remedies as to all of his claims prior to filing suit in federal court."); *Boyd v. Ferguson*, No. 05-1543, 2006 WL 1793267, *2 (CA10 June 30, 2006) ("Because Boyd did not completely exhaust administrative remedies for all of his claims, § 1997e(a) requires his complaint to be dismissed."). And the two circuits that have rejected the "total exhaustion" rule, see *Lira v. Herrera*, 427 F.3d 1164, 1170 (CA9 2005), petition for cert. pending, No. 05-878 (filed Jan. 6, 2006); *Ortiz v. McBride*, 380 F.3d 649, 656-63 (CA2 2004), cert. denied, 125 S.Ct. 1398 (2005), will not likely have an occasion to revisit their prior decisions on the issue because their rejection of the "total exhaustion" rule is unlikely to be presented again on appeal. Accordingly, this development simply means that there is now a split within the Sixth Circuit, just as there is a split among the circuits. Finally, it would be imprudent for this Court not to resolve this issue now. At least two circuits that have not yet taken a position on the issue have expressly deferred submission of their lead cases presenting the issue pending this Court's resolution of these consolidated cases. See Clerk's Letter, *Walker v. Zenk*, No. 03-3298 (CA3 May 31, 2006) (deferring oral argument pending *Jones*); Court Order, *Al-Amin v. Johnson*, No. 05-6455 (CA4 July 10, 2006) (placing case in abeyance pending *Jones* and *Williams*).

"The total grievance process * * * shall be completed within 90 calendar days unless an extension of 15 business days has been requested by [the MDOC] and has been granted by the grievant." MDOC Policy Directive (PD) No. 03.02.130 ¶ (V) (Nov. 1, 2000).[3] To initiate the process, an inmate must first "attempt to verbally resolve the issue with the staff member involved within two business days after becoming aware of a grievable issue." *Id.* ¶ (T). "If the complaint is not resolved, the grievant may file a Step I grievance," *ibid.*, "within five business days," *id.* ¶ (Y), except that in certain cases a prisoner may bypass Steps I and II and proceed directly to Step III, see *id.* ¶ (GG) (allowing prisoners to proceed directly to Step III when alleging "racial or ethnic discrimination and staff brutality or corruption").

To initiate a Step I grievance, a prisoner must "use the Prisoner/Parolee Grievance form (CJS-247A)." *Id.* ¶ (U). The inmate must complete two parts of the form, which instructs that the inmate should "[b]e brief and concise in describing [the] grievance issue." E.g., JAII 1. The first part requires the prisoner to describe his or her "attempt * * * to resolve this issue prior to writing this grievance." *Ibid.* The second requires the prisoner to "[s]tate [the] problem clearly." *Ibid.* The information to be provided shall be "limited to the issue being grieved" and only need

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[3] The full-text of the PD effective when petitioners participated in the MDOC's grievance system is part of the record on appeal and is reproduced at pages 138 through 157 of the Joint Appendix. For simplicity, we cite to it throughout this brief by applicable paragraph, rather than by Joint Appendix page number.

Michigan has since revised the PD, and as of the printing of this brief, respondents represented that they would reproduce the new version as an appendix to their brief. Because petitioners participated in the MDOC grievance system governed by the old PD, the new PD is irrelevant to these cases.

"be as specific as possible." PD ¶ (U). And, although "[a]dditional pages may be attached, if necessary, * * * grievants are encouraged to limit the information to the grievance form." *Ibid.*

Once a Step I grievance is submitted, a grievance coordinator "shall assign an appropriate respondent" who "shall generally be the supervisor of the person being grieved." *Id.* ¶ (Z). After the respondent interviews the prisoner and "gather[s] any additional information needed to respond to the grievance," *id.* ¶ (AA), the respondent will complete the bottom portion of the form and "return [it] to the grievant * * * within 15 business days, unless an extension has been granted," *id.* ¶ (CC). If a prisoner "is dissatisfied with the response received at Step I, s/he may request a Prisoner/Parolee Grievance Appeal form (CSJ-247B) from the Step I Grievance Coordinator within five business days after receiving the Step I response," *id.* ¶ (DD); see also *id.* ¶ (U), and "appeal to Step II," *id.* ¶ (T), "within five business days after receiving the CSJ-247B from the Step I Grievance Coordinator," *id.* ¶ (DD).

The Step II appeal form simply requires the prisoner to state his or her "[r]eason for appeal." E.g., JAII 4. Once a Step II grievance is submitted, the Grievance Coordinator "shall [again] assign an appropriate respondent," who shall generally be "[t]he Warden * * * except that s/he may delegate this responsibility to the appropriate Deputy Warden if more than one institution is supervised" or, *inter alia*, "[t]he Regional Health Care Administrator or designee in grievances alleging inadequate medical care." PD ¶¶ (EE)(1) & (4). "[W]ithin 15 business days after receipt of the Step II grievance, unless an extension is granted," *id.* ¶ (FF), the Step II respondent shall inform the prisoner of the outcome on the prisoner's CSJ-247B from, e.g., JAII 4, and return it to the prisoner, PD ¶ (FF).

"If the grievant is dissatisfied with the Step II response, or does not receive a timely response, s/he may appeal to Step III," *Id.* ¶ (T), by filling out the bottom of the CSJ-247B form, stating his or her "[r]eason for appeal," e.g., JAII 4; see also PD ¶ (U), and "submitting it * * * within ten business days after receiving the Step II response," *id.* ¶ (GG). "The Director or designee shall be the respondent for Step III grievances," *id.* ¶ (HH), and provides his or her decision on a sheet of paper separate from the CSJ-247 form, e.g., JAII 4.

D. Factual and Procedural Background

1. *Jones* (No. 05-7058). On November 14, 2000, petitioner Jones was in a motor vehicle accident while incarcerated at the MDOC's Saginaw Correctional Facility (SCF). JAI 19. Jones suffered multiple serious injuries, including a cervical spine fracture and dislocation with injury to the spinal cord, which required fusion surgery; a broken arm; lower back injuries; upper and lower extremity weakness on his left side; and numbness below his neck. *Ibid.* Approximately seven months after the accident – but while Jones was still wearing neck and leg braces, utilizing a walking cane, and medicated with a muscle relaxant – the SCF's Classification Director, respondent Paul Morrison, assigned Jones to work as a "Big Yard Equipment Handler." *Id.* at 19-20. This position required Jones to lift items, stand, bend, stoop, and distribute athletic equipment to other inmates. *Id.* at 19. Jones notified Morrison and the officer to whom Jones was ordered to report, respondent Correctional Officer Michael Opanasenko, of his injuries, but his assignment was not changed. *Id.* at 19-20. Reluctantly, Jones reported to his work assignment but aggravated his injuries while attempting to complete his duties. *Id.* at 20. Opanasenko accused Jones of faking his injuries; threatened

Jones with discipline if he did not perform his duties satisfactorily; repeatedly harassed Jones; and in retaliation for complaining about his injuries, issued Jones a negative work evaluation. *Id.* at 9, 12-13.

On September 15, 2001, Jones filed a two-page typewritten Step I grievance, complaining that "Opanasenko, Health Care, Classification, Deputy Warden, and Warden * * * required [him] to work beyond that of his physical capabilities,"[4] that Opanasenko harassed and retaliated against him for complaining about his injuries, and that Opanasenko's negative work evaluation "will add to a negative probability for parole." JAII 1-2. Addressing only Jones' negative work evaluation and refusing to expunge it, Jones' Step I grievance was denied in an undated and unsigned response. *Id.* at 3. Jones appealed to Step II, claiming (1) that the Step I respondent failed to respond to Jones' work assignment claim against "Health Care, Warden [Barbara] Bock, Deputy Warden of Programs, Classification Director and Opanasenko" and (2) that removing his negative work evaluation – which the Step I respondent refused to do – was a necessary but incomplete remedy. *Id.* at 4. On October 30, 2001, Bock responded to

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[4] It is not clear when Jones learned the identities of all of the unnamed individuals who held these positions. Although respondents argued in their motion to dismiss that Jones' complaint should be dismissed because he failed to "exhaust the grievance procedure as to *each* claim against *each* defendant named in the complaint," Pet. App. 32a, the magistrate judge rejected this argument on the basis that "where a plaintiff lists a particular position that is held by only one person, [the exhaustion] requirement should be considered met," JAI 37. Respondents failed to object to that portion of the magistrate judge's report and recommendation and have, therefore, waived any challenges to it. See *Thomas v. Arn*, 474 U.S. 140, 147-48 (1985) (holding that only specific objections to the magistrate's report made to the district court will be preserved for appellate review; making some objections but failing to raise others will not preserve all the objections a party may have).

Jones' Step II appeal and partially resolved it by ordering that Jones' negative work evaluation "will be removed" from his file. *Id.* at 5. Bock denied Jones' work-assignment claim on the merits, finding that Jones "was appropriately given the job detail." *Ibid.* Dissatisfied with Bock's partial resolution at Step II, Jones appealed his grievance to Step III on November 3, 2001. *Id.* at 6-7. On December 11, 2001, the MDOC issued its response, finding that "the responses provided at Step One and Step Two adequately address[ed] the merits" of Jones' claims. *Id.* at 8.

Still dissatisfied, on November 15, 2002, Jones filed a *pro se* 42 U.S.C. 1983 federal civil rights complaint in the United States District Court for the Eastern District of Michigan. JAI 7-17. In addition to Opanasenko, the State of Michigan, and the MDOC, Jones – now aware of some of the identities of the individuals whom he had named only by title in his grievances – named respondents Bock, Valerie Chaplin (SCF's Deputy Warden of Programs), and Morrison. *Id.* at 7-9. Still unaware of the identities of the relevant "Health Care" defendants, Jones named two Doe defendants.[5] *Id.* at 7, 9.

Jones alleged that all six individual defendants were deliberately indifferent to his medical needs in violation of the Eighth and Fourteenth Amendments; that Opanasenko and Chaplin also violated his First Amendment rights by retaliating against him for complaining about his injuries;

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[5] Subsequently, Jones moved to substitute Janet Konkle, R.N., and Ahmad Aldabaugh, M.D., for the Doe "Health Care" defendants, see 02-cv-74336 Mot. to Name Defs. 1 (E.D. Mich. filed Jan. 13, 2003) (Dkt. No. 11), and on January 17, 2003, the district court granted Jones' motion, 02-cv-74336 Order 1 (E.D. Mich. filed Jan. 17, 2003) (Dkt. No. 13); see also JAI 20. For reasons unknown, these defendants were neither served nor signed waivers of service. JAI 20. Accordingly, they did not appear in the court of appeals and are not respondents here.

and that the MDOC and State of Michigan were liable under a respondeat superior theory of liability.[6] *Id.* at 13-14, 16. Jones' complaint explained that he exhausted all administrative remedies available to him and provided the dates on which he filed his Step I grievance and his Step II and Step III appeals and the dates on which he received the institution's responses.[7] *Id.* at 8. Jones neither attached copies of any of the documents from his grievance and appeals nor described with particularity the remedies he pursued or the outcome of the administrative proceedings. *Id.* at 46.

On February 13, 2003, respondents moved to dismiss Jones' complaint. Pet. App. 26a-35a. Respondents attached to their motion copies of Jones' grievance, his appeal forms, and the MDOC's responses. See JAI 28-29. On February 21, 2003, and March 28, 2003, Jones opposed respondents' motion and attached to his oppositions the proof of exhaustion that he had failed to attach to his complaint but that respondents had provided with their motion. Pet. App. 36a-51a; see also JAI 28.

The magistrate judge to whom respondents' motion was referred recommended that Jones' claims against Bock, Chaplin, Konkle, and Aldabaugh be dismissed for failure to state a claim because Jones failed to assert that any of them knew or should have known that Jones' work assignment would place him in serious risk of harm. JAI 26-27. In contrast, the magistrate recommended that

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[6] On November 19, 2002, the district court dismissed the State of Michigan and the MDOC, finding them entitled to Eleventh Amendment immunity. See 02-cv-74336 Order 2 (E.D. Mich. filed Nov. 19, 2002) (Dkt. No. 4); see also JAI 21. Jones does not challenge this order.

[7] At the time he filed his complaint, Jones had not yet received the MDOC's Step III response, JAI 8, although subsequent development of the record revealed that the Step III response was issued on December 11, 2001, Pet. App. 29a; see also JAII 8.

Jones' claims against Morrison and Opanasenko not be dismissed because Jones stated claims against them and exhausted his administrative remedies as to those claims. *Id.* at 33-38. The magistrate rejected respondents' argument that the entirety of Jones' complaint be dismissed because Jones failed to attach to his complaint proof of exhaustion or describe with particularity in his complaint how he exhausted his claims. *Id.* at 33. According to the magistrate, *who* provided proof of exhaustion, *when* it was provided, and *how* it was provided were irrelevant because all of that information was present in the record by the time the case was referred to him for evaluation and because his ability to evaluate the case expeditiously was unaffected. *Ibid.* In essence, the magistrate found that, by providing proof of exhaustion with their motion to dismiss, respondents cured – or rendered harmless – Jones' pleading error. See *ibid.* Jones, Morrison, and Opanasenko filed objections to the magistrate's report and recommendation. *Id.* at 40.

Reviewing the magistrate's report and recommendation *de novo*, the district court dismissed Jones' complaint in its entirety. The district court adopted the magistrate's recommendation that Jones' claims against Bock, Chaplin, Konkle, and Aldabaugh be dismissed but rejected his recommendation that Jones' claims against Morrison and Opanasenko should go forward. *Id.* at 41. Unlike the magistrate, the district court found that "the documentation regarding grievances supplied by [respondents] as part of their motion to dismiss does not cure [Jones'] failure to properly plead exhaustion." *Id.* at 42. The district court also found that Jones' attachment of proof of exhaustion to his opposition did not cure his pleading failure. *Id.* at 41-42. Specifically, the district court construed Jones' late provision of proof of exhaustion as an attempt to amend his complaint and, relying on *Baxter*, held that Sixth Circuit law prohibited PLRA plaintiffs from doing so. *Id.* at 42. Jones appealed.

The court of appeals affirmed, finding that the district court's dismissal of Jones' complaint was proper for two reasons. First, rather than consider Jones' challenge to the district court's dismissal of his claims against Bock, Chaplin, Konkle, and Aldabaugh for failure to state a claim, the court of appeals held that Jones' failure to comply with its heightened pleading requirement for PLRA plaintiffs was fatal to his *entire* complaint. *Id.* at 46. The court of appeals also held that *Baxter* precluded Jones from offering proof of exhaustion by attaching it to his opposition to respondents' motion to dismiss. *Ibid.* Relying on *Jones Bey*, the court held alternatively that, "even if Jones had shown he had exhausted some of his claims, the district court properly dismissed the complaint because Jones did not show that he had exhausted *all* of his claims." *Ibid.* (emphasis added).

2. *Williams* (No. 05-7142). Petitioner Williams has suffered from "noninvoluting cavernous hemangiomas" in his right arm since birth. JAI 111. This condition causes tumors to grow and results in disfigurement. *Ibid.* On March 29, 2001, Williams underwent surgery to remove a hemangioma and to relieve the pain accompanying his condition. *Ibid.* While Williams was incarcerated at the MDOC's Standish Maximum Facility (SMF), Williams went to K. Nimr Ikram, D.O., on August 8, 2001, and January 11, 2002, for consultations. *Ibid.* At both consultations, further surgery to remove additional hemangiomas and to straighten Williams' wrist was discussed. *Ibid.* Following the second consultation, Dr. Ikram referred Williams to hand surgeon Raymond C. Noellert, M.D., for further "surgery to straighten out his wrist and get function back in his finger." *Id.* at 79. On March 5, 2002, Dr. Noellert authorized Williams' surgery. *Id.* at 111.

On March 23, 2002, SMF's medical service provider, J. Hoffman, D.O., reported to the MDOC's Correctional Medical Services department (CMS) that Williams was "a

candidate for contracture release" and indicated that he would "call for authorization." *Id.* at 80-81. CMS, however, denied permission to proceed with the surgery, asserting that "functional return of the hand is not a known result. Surgery would be cosmetic and dangerous." *Id.* at 81. On March 26, 2002, Hoffman appealed the denial on the basis that "the request is for pain relief, not to regain function." *Id.* at 81. CMS rejected Hoffman's appeal, stating that "[h]and surgery will accomplish nothing" and stressing the "probable futility of it." *Id.* 81. On April 8, 2002, Hoffman again appealed, reiterating that "the request is to have surgery to relieve pain, not correction of the hand." *Id.* at 81. CMS indicated in response that the "case will be presented at [an upcoming] MDOC MAC [Medical Advisory Committee] meeting." *Id.* at 81.

Having not received any treatment or heard the results of the MAC meeting, on June 7, 2002, Williams filed a hand-written Step I grievance complaining that he had requested medical follow-up care and had not been treated. JAII 9. Although Williams did not name any individuals in the grievance, he incorporated by reference and attached to his grievance various correspondence with a registered nurse in SMF's Health Care Department, K. Wright, indicating that his "immediate concern" was whether his surgery had been approved. *Id.* at 10-13. Wright denied the grievance, explaining that "[a]ll of Williams' M.D.O.C. M.A.C. appeals were denied. * * * M.D.O.C. refused the surgery." *Id.* at 9.

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* CMS notifies MDOC medical service providers, like Dr. Hoffman, of its decision to deny or delay medical treatment authorized by the provider on a one-page form. (CMS Form CHJ-408). See 02-cv-75133 Compl. Exh. H (E.D. Mich. filed Jan. 7, 2003) (Dkt. No. 3). The provider is then given an opportunity to appeal the denial on the same form, and if the denial is upheld, to appeal a second time. *Ibid.*

Williams appealed to Step II, explaining that "[a]ny prior MDOC/MCA/CMS Appeals for surgery/therapy was not forever/final" and that "Orthopedics Expert Doctor and Physical Therapist adamantly said I need surgery/therapy." *Id.* at 14. The MDOC denied Williams' Step II appeal, explaining that "[a]ppropriate care has been given" but that further consultation with the MDOC's Bureau of Health Care Services Regional Medical Officer, defendant George Pramstaller, M.D., was planned. *Id.* at 15.

Williams appealed to Step III. *Id.* at 16. Williams explained that "Dr. Pramstaller has never conducted personal exam on me, is advocate for CMS to cut costs instead of providing treatment. Please help." *Ibid.* Williams' Step III appeal was denied on the bases that "[a]ll relevant information was considered," that "the responses provided at Step One and Step Two adequately address the merits of the main issue grieved," and that "[t]he medical opinions from professionals, such as doctors and nurses, will not be questioned by this office due to the technical expertise of the profession." *Id.* at 17.

After being transferred from SMF to the MDOC's Gus Harrison Correctional Facility (GHF), Williams requested on August 13, 2002, placement in a "handicapped accessible cell" to accommodate his condition. *Id.* at 22. Having not received a response, Williams filed a two-page typewritten Step I grievance on August 20, 2002, against GHF's Warden, respondent David Jamrog, requesting the same accommodation or, alternatively, a transfer back to one of two facilities that had previously provided Williams the accommodation. *Id.* at 20-21. Williams incorporated by reference and attached to his grievance various documents supporting his accommodation request. *Id.* at 22-27. Williams' grievance was denied on the bases that he already received assistance and a bottom bunk, that he was housed on a handicap wing, and that "[i]t appear[ed] that [he was]

trying to use [his] handicapp [sic] to get transfered [sic] to a facility of [his] choice." *Id.* at 20. Williams appealed the denial through Steps II and III of the grievance process, but his appeals were denied. *Id.* at 18, 28-30.

On September 9, 2002, Williams filed a three-page handwritten Step I grievance against GHF's Deputy Warden of Programs, respondent Mary-Jo Pass, again seeking a handicapped-accessible cell. *Id.* at 31-33. The same day, but apparently unrelated to his pending grievance, Williams was placed in a single-occupancy handicapped-accessible cell by a resident unit supervisor. JAI 67, JAII 44. Williams was removed from the cell the following day at the behest of respondent GHF Correctional Officer Chad Markwell because Williams' "health care detail" did not provide for it. JAI 67-68, JAII 43. The same day that Williams was removed from his single-occupancy cell, he filed a two-page handwritten Step I grievance against Markwell for, among other things, having him removed. JAII 43-44. Williams also filed Step I grievances against the GHF's Deputy Warden for Housing, respondent Paul Klee, and the GHF's Health Facility Manager, respondent Bonnie Peterson challenging the GHF's refusal to provide a single-occupancy cell. *Id.* at 50, 52, 54-56. Williams unsuccessfully appealed the denial of all of these grievances through Steps II and III. *Id.* at 31-64.

On January 7, 2003, Williams filed a *pro se* § 1983 federal civil rights complaint in the United States District Court for the Eastern District of Michigan against respondents MDOC Director William Overton, Jamrog, Klee, Markwell, Pass, and Peterson and defendant Pramstaller.[9]

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[9] Pramstaller was never served and, therefore, was not an appellee in the court of appeals and is not a respondent here. However, the failure to serve Pramstaller appears to have been due to the United States Marshal's lack of diligence. Accordingly, the magistrate noted

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JAI 52-75. Williams alleged that the denial of surgery and refusal to provide a handicapped-accessible cell violated Williams' rights under the Americans with Disabilities Act of 1990, 42 U.S.C. 12101 *et seq.*; section 504 of the Rehabilitation Act of 1973, 29 U.S.C. 794; and the Eighth and Fourteenth Amendments. JAI 70-71.

In lieu of filing an answer, on April 15, 2003, respondents moved to dismiss, or alternatively for summary judgment on, the entirety of Williams' complaint. *Id.* at 77. On July 22, 2003, the magistrate to whom the case was referred recommended that respondents' motion be granted. *Id.* at 76-105. The magistrate recommended that respondents' motion to dismiss should be granted as to Williams' denial of surgery claim because he failed to name any of the respondents in the grievance underlying this claim, and therefore, had failed to exhaust his administrative remedies. *Id.* at 85-86. Having already recommended that Williams' denial of surgery claim be dismissed for failure to exhaust, the magistrate applied the "total exhaustion" rule to Williams' single-occupancy cell accommodation claim[10] and

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that, if her report and recommendation were rejected – which would presumably include it being rejected after appeal – she would order the Marshal to again attempt to serve him. JAI 104 n.10.

[10] At the time the magistrates and district courts applied the "total exhaustion" rule to Williams' and Walton's complaints, the rule had not yet been endorsed by the Sixth Circuit. See *Knuckles-El*, 215 F.3d at 642 ("We reserve to another day the question of whether exhausted claims in a 'mixed' complaint should be dismissed * * * or whether such a complaint should be dismissed in its entirety."). By the time the Sixth Circuit considered Williams' and Walton's appeals, however, *Jones Bey* had adopted the "total exhaustion" rule as law of the circuit. See 407 F.3d at 805 ("[T]he PLRA's exhaustion requirement applies such that a 'mixed' complaint, alleging both exhausted and unexhausted claims, must be completely dismissed for failure to exhaust administrative remedies."); see also *id.* at 806 ("We now * * * hold[ ] that total exhaustion is required under the PLRA.").

recommended that Williams' entire complaint be dismissed. *Id.* at 93-101. Over Williams' objections, on October 31, 2003, the district court accepted and adopted the magistrate's recommendations "with regards to the failure to exhaust administrative remedies issue" and dismissed Williams' complaint in its entirety. *Id.* at 107.

On June 22, 2005, the court of appeals affirmed the judgment of the district court with analysis that tracked the magistrate's report and recommendation. *Id.* 110-16. Relying on its prior decisions in *Curry*, *Burton*, and *Thomas*, the court of appeals affirmed the dismissal of Williams' denial of surgery claim because his "grievance failed to specifically name any of the appellees that Williams has named in his complaint," even though he "did file a grievance based on the denial of medical treatment, and he appealed the grievance through Steps II and III of the grievance process." *Id.* at 114-15. Having affirmed the dismissal of Williams' denial of surgery claim, the court of appeals applied *Jones Bey*'s "total exhaustion" rule to affirm the dismissal of Williams' single-occupancy cell accommodation claim "despite the fact that he appears to have exhausted his administrative remedies" with respect to this claim. *Id.* at 114.

3. *Walton* (No. 05-7142). On July 17, 2001, petitioner Walton allegedly assaulted a correctional officer at the MDOC's Alger Maximum Correctional Facility (AMF). *Id.* at 169. The institution punished Walton by sanctioning him with an "upper slot restriction" for an indefinite period of time. *Ibid.* Nearly a year later, in April 2002, Walton, an African American, filed a one-page handwritten Step I grievance against one of the AMF's assistant deputy wardens, respondent Ron Bobo, asserting that the indefinite upper slot restriction was discriminatorily disproportionate to the definite thirty to sixty day upper slot restrictions given to white prisoners for similar

assaults. JAII 65. In support of his claim, Walton identified a white prisoner who had received a definite upper slot restriction for a similar infraction. *Ibid.* Walton's Step I grievance did not name any other MDOC staff. *Ibid.*

On April 26, 2002, respondent AMF Case Manager Denise Gerth denied Walton's Step I grievance and indicated that a different assistant deputy warden, respondent Ken Gearin, had placed Walton on the indefinite upper slot restriction and that racial discrimination had nothing to do with Gearin's decision. *Id.* at 66. Respondent AMF Resident Unit Manager Catherine S. Bauman reviewed and approved Gerth's denial of Walton's Step I grievance. *Ibid.*

On May 4, 2002, Walton appealed to Step II, restating his allegations from Step I and asserting racial discrimination on the part of "corrupt administration[ ] heads, warden, et[ ] al[.]" *Id.* at 67. On May 13, 2002, the AMF's Acting Warden, respondent David Bergh, denied Walton's Step II appeal, explaining that Walton had failed to present any new evidence and that the Step I response adequately addressed Walton's allegations. *Id.* at 68. Walton appealed to Step III. *Ibid.* In addition to restating his earlier allegations, he identified another white prisoner who was given a definite upper slot restriction assaulting a correctional officer. *Ibid.* Walton's Step III appeal was denied on the bases that "the responses provided at Step One and Step Two adequately address the merits of the main issue grieved" and that "[t]he evidence presented does not support the charges made by the Grievant." *Id.* at 69.

On August 12, 2002, Walton, filed a *pro se* § 1983 federal civil rights complaint against respondents Barbara Bouchard (AMF's Warden), Gearin, Bergh, Bauman, Gerth, and Bobo. JAI 123-36. Walton alleged that each

respondent "demonstrated [i]ntentional [a]nd [p]urposeful discrimination" and "[w]as [a]ware of the discrimination but [r]efused [t]o do [a]nything" in violation of the Equal Protection clauses of the Fifth and Fourteenth Amendments. *Id.* at 136.

In lieu of filing an answer, on January 13, 2003, respondents moved to dismiss the entirety of Walton's complaint. *Id.* at 158. On July 28, 2003, the magistrate to whom the case was referred recommended that respondents' motion be granted. See *id.* 158-64. The magistrate found that Walton exhausted his administrative remedies against only respondent Bobo because he "failed to mention the other named defendants in his grievances, even after the Step I response informed plaintiff that [another] defendant * * * was responsible for giving him the restriction." *Id.* at 159. Having found that Walton failed to exhaust his administrative remedies against the remaining defendants, the magistrate recommended that the entirety of Walton's complaint be dismissed under the "total exhaustion" rule. See *id.* at 159-63. Over Walton's objections, on October 14, 2003, the district court adopted the magistrate's report and recommendation in full and dismissed Walton's complaint. See *id.* at 165-66.

On June 17, 2002, the court of appeals affirmed the judgment of the district court with analysis that tracked the magistrate's report and recommendation and is indistinguishable from its analysis in petitioner Williams' case. See *id.* at 168-73. Relying on its prior decisions in *Curry* and *Burton*, the court of appeals held that Walton "named only [one defendant – respondent Bobo] in Step I of his grievance process, and under our precedent that is the only claim that we may consider exhausted." *Id.* at 172. Having thus found that Walton's claims against the remaining defendants were unexhausted, the court of appeals applied *Jones Bey*'s "total exhaustion" rule to

affirm the dismissal of Walton's entire complaint. *Ibid.* ("His claims as to all other defendants remain unexhausted and accordingly the district court properly dismissed the entire complaint under *Jones Bey*'s total exhaustion requirement.").

SUMMARY OF ARGUMENT

Applying three rules purportedly required by the PLRA's text, structure, and underlying purposes, the Sixth Circuit below affirmed the dismissal of petitioners' complaints notwithstanding that they each indisputably exhausted at least some of their claims. None of those rules are supported by the text, structure, or Congress' purposes in enacting the PLRA. By applying such judge-made embellishments to *pro se* prisoners, the court of appeals not only violated the "cardinal canon" of construction "that a legislature says in a statute what it means and means in a statute what it says," *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992), but ignored this Court's tradition of avoiding constructions of statutes that would "trap the unwary pro se prisoner." *Rose v. Lundy*, 455 U.S. 509, 520 (1982).

1. Contrary to the PLRA's text and structure and incompatible with the Federal Rules of Civil Procedure, the Sixth Circuit held that PLRA plaintiffs are required to document or, in the absence of documentation, plead with specificity how and when they exhausted their claims, lest their complaints be dismissed without leave to amend. Under the Federal Rules, non-exhaustion is an affirmative defense that this Court requires defendants to plead and prove. Congress could have required PLRA plaintiffs to plead exhaustion, but it decidedly did not. Although the PLRA provides that a district court "shall" dismiss an action that is "frivolous, malicious, [or] fails to state a claim," 42 U.S.C. 1997e(c)(1), Congress did not include

failure to exhaust among the grounds requiring mandatory dismissal. Had it done so, PLRA plaintiffs would have to plead exhaustion to avoid mandatory dismissal. But it did not. Within the same subsection, but in the following paragraph, Congress provided that a district court *may* dismiss unexhausted claims. 42 U.S.C. 1997e(c)(2). Reading § 1997e(c)(1)'s mandatory dismissal provision to include failure to exhaust would render § 1997e(c)(2)'s permissive dismissal provision superfluous and violate the *expressio unius* canon of statutory construction.

Even if PLRA plaintiffs were required to plead exhaustion to avoid mandatory dismissal, the Sixth Circuit's heightened pleading standard is indefensible. "Rule 8(a)'s simplified pleading standard applies to all civil actions, with limited exceptions" enumerated in Rule 9. *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 513 (2002). Exhaustion is not listed among Rule 9's exceptions, and although PLRA exhaustion is "mandatory," *Woodford v. Ngo*, 126 S.Ct. 2378, 2382 (2006), it is not a "condition precedent" under Rule 9(c). Equally misguided is the Sixth Circuit's "no amendment" rule, which cannot be reconciled with the Court's admonition that Rule 15(a)'s mandate that "leave [to amend] shall be freely given" "is to be heeded," *Foman v. Davis*, 371 U.S. 178, 182 (1962). Nor did the PLRA repeal by implication or impliedly supersede Rules 8 and 15 for purposes of the PLRA because the PLRA's screening provision, 28 U.S.C. 1915A, is not in "irreconcilable conflict" with, nor does it "cover[ ] the whole subject[s]" of pleading and amendment of pleadings, *Branch v. Smith*, 538 U.S. 254, 273 (2003).

2. Without any textual basis, contrary to established principles of administrative law and federal pleading procedure, and even though the MDOC's grievance procedure did not require it, the Sixth Circuit imposed a requirement that, for a prisoner to sue a

particular individual, that individual must have been identified in the prisoner's Step I grievance. By freezing the universe of potential defendants at the moment a prisoner files a Step I grievance, this "name all defendants" rule cannot be reconciled with the Federal Rules' policy of permissive joinder and liberal amendment. Without any textual indication that Congress intended such a result, this departure from established procedure is impermissible. Nor is the rule consistent with Congress' primary purpose in enacting the PLRA to provide prison officials notice of *problems* – not the identities of particular miscreants – in their prisons.

Additionally, the rule is inconsistent with this Court's decision in *Sims v. Apfel*, 530 U.S. 103 (2000). Prison grievance proceedings are necessarily informal and inquisitorial – not adversarial. *Sims* rejected an attempt, just like the Sixth Circuit's, to impose a technical exhaustion requirement on an informal and inquisitorial administrative process from which the requirement is absent from the process' own rules. Finally, the rule is incompatible with this Court's "proper exhaustion" framework, *Ngo*, 126 S.Ct. at 2382, under which a prisoner will be found to have exhausted his or her administrative remedies so long as he or she "us[es] all steps that the agency holds out, and do[es] so properly (so that the agency addresses the issues on the merits)." *Id.* at 2385. Petitioners filed grievances and appeals through all steps of the available process. No grievance was rejected on a procedural ground, and petitioners received decisions on the merits of their claims.

3. Equally unsupported is the Sixth Circuit's rule that properly exhausted claims must be dismissed whenever joined in the same complaint with one or more unexhausted claims. Section 1997e(a) states that "no action shall be brought * * * until such administrative remedies as are available are exhausted." Contrary to the Sixth Circuit's holding that Congress' use of the word "action"

requires dismissal of an entire mixed action, § 1997e(a) cannot be read in isolation. Congress' use of the word in other sections of the PLRA demonstrates that Congress intended mixed actions to be cured by dismissal of only the unexhausted claims.

Although the Sixth Circuit analogized its "total exhaustion" rule to the similarly named rule in habeas law, that judge-made habeas rule is inapplicable. The habeas "total exhaustion" rule was designed as a policy-based accommodation to federal-state comity concerns unique to habeas proceedings. There is no need to resort to policy to remedy a mixed PLRA complaint because the statute is clear. Moreover, the flexible rule in habeas, which does not *require* dismissal of an entire mixed habeas petition, is an unhelpful analogy because it does not resemble Sixth Circuit's inflexible rule, which requires dismissal of a prisoner's PLRA action in its entirety.

ARGUMENT

I. THE EXHAUSTION RULES USED BY THE SIXTH CIRCUIT TO JUSTIFY DISMISSAL OF PETITIONERS' COMPLAINTS VIOLATE THIS COURT'S PROHIBITION ON JUDICIAL SUPPLEMENTATION OF LEGISLATIVE ACTS AND ARE INCONSISTENT WITH THE LENIENCY THIS COURT AFFORDS *PRO SE* PRISONERS

These statutory interpretation cases are governed by the "cardinal canon" that presumes "that a legislature says in a statute what it means and means in a statute what it says," *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992), and the concomitant recognition that when a provision is not fairly contained in statutory language, the Court will not, in pursuit of the alleged policy of the statute, "engraft" it, even where the absent provision "undoubtedly would serve the Government's objectives,"

United States Dep't of Justice v. Landano, 508 U.S. 165, 181 (1993); see also *Dodd v. United States*, 125 S.Ct. 2478, 2483 (2005) (Court will not "rewrite the statute that Congress has enacted" despite the "potential for harsh results"); *Lamie v. United States Tr.*, 540 U.S. 526, 538 (2004) (Court will not "read an absent word into the statute"); *Rodriguez v. United States*, 480 U.S. 522, 525-26 (1987) ("[N]o legislation pursues its purposes at all costs. Deciding what competing values will or will not be sacrificed to the achievement of a particular objective is the very essence of legislative choice – and it frustrates rather than effectuates legislative intent simplistically to assume that whatever furthers the statute's primary objective must be the law."); *United States v. Goldenberg*, 168 U.S. 95, 103 (1897) ("No mere omission * * * which it may seem wise to have specifically provided for, justif[ies] any judicial addition to the language of the statute."). Consistent with these interpretive principles, this Court has warned previously against judicial invention of exhaustion requirements not mandated by Congress based on judicial views about policy questions. *Patsy v. Bd. of Regents of Fla.*, 457 U.S. 496, 501, 514 (1982) (warning that resolving the inevitable subsidiary questions about the application of such a judge-made requirement "would create costly, remedy-delaying, and court-burdening litigation if answered incrementally by the judiciary in the context of diverse constitutional claims relating to thousands of different state agencies").

The plain text of the PLRA's exhaustion requirement states that "[n]o action shall be brought * * * until such administrative remedies as are available are exhausted." 42 U.S.C. 1997e(a). With this simple provision, Congress imposed a "mandatory exhaustion" requirement, *Porter v. Nussle*, 534 U.S. 516, 529 (2002), that "mean[s] what the term means in administrative law" and is "substantially

similar" to what the term means in "[t]he law of habeas corpus," *Woodford v. Ngo*, 126 S.Ct. 2378, 2386, 2387 (2006). Thus, as the Court explained in *Ngo*, "mandatory exhaustion" requires "proper exhaustion * * * which 'means using all steps that the agency holds out, and doing so properly (so that the agency addresses the issues on the merits).'" *Id.* at 2385 (quoting *Pozo v. McCaughtry*, 286 F.3d 1022, 1024 (CA7), cert. denied, 537 U.S. 949 (2002)).

None of the rules on which the court of appeals justified dismissal of petitioners' complaints are found in the PLRA – much less, in its exhaustion provision. "[U]sing all steps * * * and doing so properly" is *all* that the PLRA's exhaustion provision requires of a prisoner, and is precisely what petitioners did in the administrative proceedings underlying these cases: Petitioners filed grievances, appealed the denials of those grievances through all levels of the MDOC's grievance system without having any submissions rejected on procedural grounds, and received final administrative decisions on the merits. Nonetheless, in each case, the court of appeals essentially held that dismissal was required not because a provision of the PLRA expressly commanded it, but instead for reasons believed by the court to vindicate or effectuate the PLRA's exhaustion requirement. Indeed, even some of the courts espousing the rules used to justify the dismissal of petitioners' complaints acknowledge the absence of express statutory authority for their rules. See, e.g., *Ross v. County of Bernalillo*, 365 F.3d 1181, 1190 (CA10 2004) (acknowledging that the PLRA only "suggests" a "total exhaustion" rule); *Steele v. Federal Bureau of Prisons*, 355 F.3d 1204, 1207 (CA10 2003), cert. denied, 125 S.Ct. 344 (2004) (acknowledging that the PLRA does not "directly address[]" the parties' respective pleading burdens); cf. *Curry v. Scott*, 249 F.3d 493, 505 (CA6 2001) (offering no textual support for its "name all defendants" rule). Absent

statutory command, these judge-made and policy-based attempts to rewrite the PLRA cannot be squared with this Court's steadfast prohibition on judicial supplementation of legislative acts.

Moreover, these three consolidated cases are particularly inappropriate candidates for the Court to depart from this well-settled prohibition because of the Court's traditional leniency toward *pro se* litigants generally and *pro se* prisoners specifically. This Court has long held that construction of a statute that imposes "technicalities" or encourages a litigant's claims to be forfeited through procedural errors is "particularly inappropriate in a statutory scheme in which laymen, unassisted by trained lawyers initiate the process." *Love v. Pullman*, 404 U.S. 522, 526 (1972); see also *Edelman v. Lynchburg Coll.*, 535 U.S. 106, 115 (2002) (construing statute to ensure that "the lay complainant * * * will not risk forfeiting his rights inadvertently"); *Mohasco Corp. v. Silver*, 447 U.S. 807, 816 n.19 (1980) (court should not "read in a time limitation provision that Congress has not seen fit to include" in statutory scheme in which "laymen * * * initiate the process."). Ninety-six percent of prison civil rights cases are prosecuted by prisoners *pro se*. Roger A. Hanson & Henry W.K. Daley, U.S. Dep't of Justice, Bureau of Justice Statistics, *Challenging the Conditions of Prisons & Jails: A Report on Section 1983 Litigation* 21, 22 (Dec. 1994), *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/ccopaj.pdf. A likely greater percentage prosecute administrative grievances without counsel because, even with a civil rights attorney to prosecute the dispute in court, many prison grievance systems prohibit lawyers from participating in their grievance processes. See, e.g., U.S. Dep't of Justice, Bureau of Prisons, Program Statement on Administrative Remedy Program, Directive No. 1330.13, § 540.16 (Aug. 13, 2002), *available at* http://www.bop.gov/policy/

progstat/1330_013.pdf (explaining that, although an inmate may obtain assistance from outside sources, including attorneys, "no person may submit a Request or Appeal on the inmate's behalf," and seeking outside assistance will not justify a filing delay).

The Court has been equally – if not more – lenient when the *pro se* litigant is a prisoner for at least two reasons. First, "[t]he right to file for legal redress in the courts" is "more valuable" for prisoners. *Hudson v. McMillian*, 503 U.S. 1, 15 (1992) (Blackmun, J., concurring). Having been "divested of the franchise, the right to file a court action stands, in the words of *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886), as [a prisoner's] most 'fundamental political right, because preservative of all rights.'" *Ibid.*; see also *McCarthy v. Madigan*, 503 U.S. 140, 153 (1992) ("[F]ederal courts must take cognizance of the valid constitutional claims of prison inmates." (quoting *Turner v. Safley*, 482 U.S. 78, 84 (1987))). That right guarantees prisoners that they will not be prevented arbitrarily from litigating a federal action, *Ex parte Hull*, 312 U.S. 546, 549 (1941), and, further, that they will have "a reasonably adequate opportunity to present claimed violations of fundamental constitutional rights to the courts," *Bounds v. Smith*, 430 U.S. 817, 825 (1977); see also *Lewis v. Casey*, 518 U.S. 343, 351 (1996) ("[M]eaningful access to the courts is the touchstone.").

Additionally, prisoners are often uneducated, unsophisticated, and legally inexperienced, thereby placing them at a significant competitive disadvantage vis-à-vis the educated, trained, and repeat-player prison officials they confront at the administrative level and the government lawyers they face in court. John Boston, *The Prison Litigation Reform Act: The New Face of Court Stripping*, 67 Brook. L. Rev. 429, 431 (2001); see also Caroline Wolf Harlow, U.S. Dep't of Justice, Bureau of Justice Statistics,

Education and Correctional Populations 1 (Jan. 2003), *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/ecp.pdf (reporting that over 41% of inmates in the Nation's State and Federal prisons and local jails have failed to complete high school or its equivalent); Karl O. Haigler et al., U.S. Dep't of Education Office of Education and Research, *Literacy Behind Prison Walls: Profiles of the Adult Prison Population from the National Adult Literacy Survey* xviii (Oct. 1994), *available at* http://nces.ed.gov/pubs94/94102.pdf (reporting that seven out of ten U.S. inmates operate at the two lowest levels of literacy on a five-level scale). Accordingly, the Court has been careful to construe statutes so as "not to 'trap the unwary pro se prisoner,'" *Slack v. McDaniel*, 529 U.S. 473, 487 (2000) (quoting *Rose v. Lundy*, 455 U.S. 509, 520 (1982)), and to hold "prisoner complaints * * * 'to less stringent standards than formal pleadings drafted by lawyers,'" *Hughes v. Rowe*, 449 U.S. 5, 9-10 (1980) (quoting *Haines v. Kerner*, 404 U.S. 519, 520 (1972)). The Sixth Circuit's rules at issue in these cases ignore these long-standing policies.

II. THE SIXTH CIRCUIT'S JUDICIALLY-CREATED HEIGHTENED PLEADING REQUIREMENT IS INCONSISTENT WITH THE PLRA'S TEXT AND STRUCTURE AND CONTRAVENES THE FEDERAL RULES OF CIVIL PROCEDURE

A. Non-Exhaustion Is an Affirmative Defense that the Federal Rules of Civil Procedure Require Defendants to Plead and Prove

The Federal Rules of Civil Procedure "govern the procedure in the United States district courts in all suits of a civil nature," Fed. R. Civ. P. 1, subject to certain limitations enumerated in Rule 81, Fed. R. Civ. P. 1 advisory committee's note 1 ("Rule 81 states certain

limitations in the application of these rules to enumerated special proceedings."). Rule 81, however, does not exempt PLRA suits from application of the Federal Rules. Accordingly, the Federal Rules apply.

Under the Federal Rules, "[n]o technical forms of pleading * * * are required," R. 8(e)(1), and "[a]ll pleadings shall be so construed as to do substantial justice," R. 8(f). Rule 8(a) requires only that a plaintiff plead: (1) "the grounds upon which the court's jurisdiction depends," (2) "a short plain statement of the claim showing that the pleader is entitled to relief," and (3) "a demand for judgment." Fed. R. Civ. P. 8(a). As this Court has long recognized, Rule 8(a)'s "short plain statement" requirement is designed "simply [to] 'give the defendant fair notice of what the plaintiff's claim is and the grounds on which it rests.'" *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 512 (2002) (quoting *Conley v. Gibson*, 355 U.S. 41, 47 (1957)).

Rule 9 addresses "Pleading Special Matters" but administrative exhaustion – much less, PLRA exhaustion – is not listed among them. See Fed. R. Civ. P. 9 (describing pleading requirements for (a) capacity; (b) fraud, mistake, or condition of the mind; (c) conditions precedent; (d) official document or act; (e) judgment; (f) time and place; (g) special damage; and (h) admiralty and maritime claims). In *Brown v. Toombs*, 139 F.3d 1102, 1104 (CA6), cert. denied, 525 U.S. 833 (1998), the Sixth Circuit characterized PLRA exhaustion as a "condition precedent" to suit within the meaning of Rule 9(c). But Rule 9(c) simply has no application here; it does not require a plaintiff to plead exhaustion in any type of suit – much less, a PLRA suit. Rule 9(c) provides: "In pleading the performance or occurrence of conditions precedent, it is sufficient to aver generally that all conditions have been performed or have

occurred."[11] As the leading federal practice treatise observes, "By its terms the * * * rule applies only to conditions 'precedent,' not to the performance of procedural or administrative requirements for filing the claim or to the anticipation of possible defenses." 5A Charles A. Wright & Arthur R. Miller, *Federal Practice and Procedure: Civil* § 1303 (2006).

Even if exhaustion was a condition precedent, Rule 9(c) would not require that it be pleaded because the rule does not require conditions precedent to be pleaded. 2 James Wm. Moore, *Moore's Federal Practice*, § 9.04[1] (3d ed. 1997) ("Neither Rule 9(c) nor Rule 8(a)(2) expressly requires that the performance or occurrence of conditions precedent be pled at all by a claimant."). Rather, it merely sets forth the manner in which such allegations, if required for some other independent reason, must be pleaded. E.g., *Kiernan v. Zurich Cos.*, 150 F.3d 1120, 1124 (CA9 1998). Because exhaustion is not listed among the matters that Rules 8(a) or 9 require a plaintiff to plead, and because non-exhaustion is plainly a defense to any claim requiring that administrative or state remedies first be exhausted, the burden of pleading it plainly falls on defendants. See Fed. R. Civ. P. 8(c) (requiring a defendant to "set forth affirmatively" "any other matter constituting an * * * affirmative defense").

Accordingly, it is no surprise that this Court has consistently characterized exhaustion as an affirmative defense in the administrative law context.[12] See *Felder v.*

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[11] The Rule requires that "[a] *denial* of performance or occurrence shall be made specifically and with particularity." Fed. R. Civ. P. 9(c) (emphasis added).

[12] Similarly, to the extent that this Court's habeas jurisprudence is relevant here (see *infra* Part IV(B)), this Court has consistently characterized exhaustion as an affirmative defense in the habeas

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Casey, 487 U.S. 131, 157 (1988) (construing "Wisconsin's notice of claim statute, which imposes a limited exhaustion of remedies requirement on those with claims against municipal governments and their officials" as "a special affirmative defense in litigation"); *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 393 (1982) ("hold[ing] that filing a timely charge of discrimination with the EEOC is not a jurisdictional prerequisite to suit in federal court, but a requirement that, like a statute of limitations, is subject to waiver, estoppel, and equitable tolling.").[13] Nor is

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context. See *Day v. McDonough*, 126 S.Ct. 1675, 1678, 1682 (2006) (describing "exhaustion of state remedies" in the habeas context as an affirmative defense and likening it to "the statute of limitations defense"); *Granberry v. Greer*, 481 U.S. 129, 132 n.5 (1987) ("[T]he answer to a habeas petition shall state whether the petitioner has exhausted his state remedies including any post-conviction remedies available to him under the statutes or procedural rules of the state." (quotation omitted)).

[13] The courts of appeals have repeatedly held in numerous other contexts that exhaustion is an affirmative defense.

- ADEA: *Belgrave v. Pena*, 254 F.3d 384, 386-87 (CA2 2001); *Daugherity v. Traylor Bros., Inc.*, 970 F.2d 348, 352 (CA7 1992)
- ERISA: *Paese v. Hartford Life Accident Ins. Co.*, 449 F.3d 435, 446 (CA2 2006); *Bourgeois v. Pension Plan for Employees of Santa Fe Intern. Corps.*, 215 F.3d 475, 479 (CA5 2000)
- IDEA: *Mosely v. Bd. of Educ.*, 434 F.3d 527, 532-33 (CA7 2006)
- LMRA: *Walk v. P*I*E Nationwide, Inc.*, 958 F.2d 1323, 1330 (CA6 1992); *Sellers v. M.C. Floor Crafters, Inc.*, 842 F.2d 639, 642 n.2 (CA2 1988)
- Title VII: *Downey v. Runyon*, 160 F.3d 139, 146 (CA2 1998); *Williams v. Runyon*, 130 F.3d 568, 573 (CA3 1997); *Bowden v. United States*, 106 F.3d 433, 437 (CADC 1997); *Brown v. Marsh*, 777 F.2d 8, 13 (CADC 1985)
- TVPA: *Jean v. Dorelien*, 431 F.3d 776, 781 (CA11 2005)

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it any surprise that the overwhelming majority of the circuits have held that PLRA exhaustion is an affirmative defense to be pleaded and proven by the defense.[14]

B. The PLRA's Text and Structure Demonstrate that Congress Carefully Declined to Make PLRA Exhaustion an Element of a Prisoner's § 1983 Claim or to Require a Prisoner to Plead It

In holding that a PLRA plaintiff is required to plead exhaustion, the Sixth and Tenth Circuits have emphasized Congress' decision to make exhaustion mandatory rather than discretionary and to use the imperative language "no action shall be brought * * * until such administrative remedies as are available are exhausted" in § 1997e(a). See *Steele*, 355 F.3d at 1209; *Brown*, 139 F.3d at 1104. But these courts have failed to explain how this language imposes a mandatory burden of pleading exhaustion on

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Of course, exhaustion need not always be an affirmative defense. "Legislatures know how to indicate that exhaustion is a pleading requirement when they want to." *Wyatt v. Terhune*, 315 F.3d 1108, 1118 (CA9), cert. denied, 540 U.S. 810 (2003) (citing *Walton v. Nalco Chemical Co.*, 272 F.3d 13 (CA1 2001)). Critically, however, there is no indication in the PLRA or its legislative history that Congress intended PLRA exhaustion to be.

[14] Compare *Casanova v. Dubois*, 304 F.3d 75, 77 (CA1 2002) (affirmative defense); *Jenkins v. Haubert*, 179 F.3d 19, 28-29 (CA2 1999) (same); *Ray v. Kertes*, 285 F.3d 287, 295 (CA3 2002) (same); *Anderson v. XYZ Corr. Health Servs., Inc.*, 407 F.3d 674, 681 (CA4 2005) (same); *Massey v. Helman*, 196 F.3d 727, 735 (CA7 2000), cert. denied, 532 U.S. 1065 (2001) (same); *Foulk v. Charrier*, 262 F.3d 687, 697 (CA8 2001) (same); *Wyatt*, 315 F.3d at 1119 (CA9 – same); and *Jackson v. District of Columbia*, 254 F.3d 262, 267 (CADC 2001) (*Jackson II*) (same), with *Brown*, 139 F.3d at 1104 (CA6 – pleading requirement); *Steele*, 355 F.3d at 1209-10 (CA10 – same); and *Rivera v. Allin*, 144 F.3d 719, 731 (CA 11), cert. dismissed, 524 U.S. 978 (1998) (same).

prisoners. Indeed, the Tenth Circuit has acknowledged that the PLRA does not "directly address[ ]" the parties' respective pleading burdens. *Steele*, 355 F.3d at 1207.

All affirmative defenses are "mandatory" insofar as the plaintiff cannot prevail if the defendant establishes them. Exhaustion is no different from statutes of limitations, which "equally imperative," also require a plaintiff to satisfy a condition (timely filing) before prevailing on the merits of his or her suit. *Wyatt*, 315 F.3d at 1118 (quoting *Jackson v. District of Columbia*, 89 F.Supp.2d 48, 56 (D.D.C. 2000) (*Jackson I*), vacated and remanded on other grounds, 254 F.3d 262 (CADC 2001). Yet the burden to plead and prove the failure to satisfy a limitation period unilaterally is placed on the defendant. Fed. R. Civ. P. 8(c); see also *Perez v. Wisconsin Dep't of Corr.*, 182 F.3d 532, 536 (CA7 1999) (likening exhaustion under PLRA to statute of limitations).

The Tenth Circuit concluded that it would "trivializ[e]" the exhaustion requirement to classify it as an affirmative defense. *Steele*, 355 F.3d at 1209. But this reasoning is even more flimsy than the Sixth and Tenth Circuits' prior justification. There are many affirmative defenses that this Court has recognized as far from trivial. For example, despite the many important policies underlying qualified immunity, see *Harlow v. Fitzgerald*, 457 U.S. 800, 814 (1982) (stressing the importance of preventing frivolous suits against government officials, which may dampen the ardor with which they carry out their jobs), the Court has never wavered from its conclusion that the burden of pleading qualified immunity rests exclusively with the defendant, see *Gomez v. Toledo*, 446 U.S. 635, 640 (1980) (holding that qualified immunity is one of Rule 8(c)'s "any other matter[s] constituting an avoidance or affirmative defense").

The Sixth, Tenth, and Eleventh Circuits have also held that a PLRA "complaint 'that fails to allege the requisite exhaustion of remedies is tantamount to one that fails to state a claim upon which relief may be granted,'" thereby rendering exhaustion a prerequisite to suit that PLRA plaintiffs must allege in their complaints. *Steele*, 355 F.3d at 1210 (quoting *Rivera*, 144 F.3d at 731); see also *Baxter v. Rose*, 305 F.3d 486, 489 (CA6 2002) ("A plaintiff who fails to allege exhaustion of administrative remedies through 'particularized averments' does not state a claim on which relief may be granted, and his complaint must be dismissed."). Not only is the suggestion that failing to allege exhaustion is "tantamount to one that fails to state a claim" precisely the kind of judicial gloss that this Court forbids, see *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75, 79 (1998) ("[I]t is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed."); *Sedima, S.P.R.L. v. Imrex Co., Inc.*, 473 U.S. 479, 495 n.13 (1985) ("[C]ongressional silence, no matter how 'clanging,' cannot override the words of the statute."), it also ignores that exhaustion is not an element of a § 1983 claim. The elements of a § 1983 claim are not mysterious; "to state a claim under § 1983, a plaintiff must allege the violation of a right secured by the Constitution and laws of the United States, and must show that the alleged deprivation was committed by a person acting under color of state law." *West v. Atkins*, 487 U.S. 42, 48 (1988) (citing *Parratt v. Taylor*, 451 U.S. 527, 535 (1981); *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149, 155 (1978)); accord, *Gomez*, 446 U.S. at 640.

This is not to suggest that Congress was powerless to make exhaustion an element of a prisoner's § 1983 claims. A straightforward reading of the PLRA's text and

structure, however, reveals that Congress carefully declined to do so.[15] E.g., *Anderson*, 407 F.3d at 681 ("If Congress had been less precise when drafting the PLRA, then perhaps the argument [that exhaustion must be pleaded] would be more persuasive.").

First, the interplay between § 1997e(c)(1) and (2) would make little sense if failure to state a claim included failure to exhaust. Paragraph (1) states that a district court "shall" dismiss actions that are "frivolous, malicious, [or] fail[] to state a claim upon which relief can be granted." These grounds for dismissal necessarily go to the *merits* of a claim as pleaded by the prisoner plaintiff. Nowhere does paragraph (1) indicate that district courts are commanded to dismiss for failure to exhaust administrative remedies. Paragraph (2) states that courts "may" dismiss claims on the same listed bases but adds that a court may do so "without first requiring the exhaustion of administrative remedies." "If failure to state a claim included failure to exhaust for purposes of Section 1997e(c), then paragraph (2) would carry the highly improbable meaning that courts may dismiss for failure to exhaust administrative remedies without first requiring exhaustion of administrative remedies." *Snider v. Melindez*, 199 F.3d 108, 111 (CA2 1999). Furthermore, paragraph (2) would direct courts that they "may" do what paragraph (1) asserts they "shall" do. E.g., *Ray*, 285 F.3d at 296 n.9 ("Any argument that Congress intended the broad categories in Section 1997e(c)(1) to include dismissal for failure to

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[15] Nor is PLRA exhaustion a jurisdictional requirement that a prisoner must plead under Rule 8(a). Prior to *Ngo*, every court of appeals had held that PLRA exhaustion is not jurisdictional, see *Steele*, 355 F.3d at 1208 (collecting cases and noting "numerous reasons for the circuit courts' unanimity"), and in *Ngo* this Court made clear that it is not. 126 S.Ct. at 2392.

exhaust is *demolished* by Section 1997e(c)(2)." (quoting *Jackson I*, 89 F.Supp.2d at 57) (emphasis added)).

Second, this reading, by rendering § 1997e(a) redundant, would also violate "[t]he rule against superfluities," *Hibbs v. Winn*, 542 U.S. 88, 101 (2004), which requires that "[a] statute * * * be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant," Norman J. Singer, *Sutherland Statutes & Statutory Construction* § 46.06, at 181-186 (rev. 6th ed. 2000); see also *Duncan v. Walker*, 533 U.S. 167, 174 (2001) (disapproving statutory interpretations that render provisions superfluous). There would simply be no need to provide that prisoner actions may not be brought until administrative remedies are exhausted, as § 1997e(a) provides, if § 1997e(c)(1) mandated dismissal for failure to exhaust administrative remedies.

Finally, this reading would violate the *expressio unius est exclusio alterius* statutory-construction canon. See *Russello v. United States*, 464 U.S. 16, 23 (1983) ("[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." (quotation omitted)); accord, *Bates v. United States*, 522 U.S. 23, 29-30 (1997) (same); 2A Singer, *supra* § 47.25, at 327 ("There is generally an inference that omissions are intentional. This rule is based on logic and common sense. It expresses the concept that when people say one thing they do not mean something else."). The PLRA's exhaustion requirement is contained in the same statutory section, § 1997e(a), and just a few printed lines before § 1997e(c)(1)'s list of grounds for dismissal. Under these circumstances, the absence of failure-to-exhaust as grounds for dismissal in § 1997e(c) must be viewed as an intentional congressional omission. E.g., *Anderson*, 407

F.3d at 680; see also *id.* at 681 ("It * * * is not for us to read failure-to-exhaust into § 1997e(c)(2)."); *Ray*, 285 F.3d 296 ("Congress had not forgotten about the need for exhaustion, but chose not to include failure to exhaust among the grounds for which the court could dismiss *sua sponte*. * * * [T]he inference is inescapable that Congress did not intend to include failure to exhaust among the categories justifying *sua sponte* dismissal.").

C. Even if PLRA Plaintiffs Are Required to Plead Exhaustion, the Heightened Pleading Rule Imposed by the Sixth Circuit Cannot Be Squared with the Federal Rules of Civil Procedure and this Court's Precedents Interpreting Them

Federal Rule of Civil Procedure 8(a)'s liberal notice pleading requirement simply requires that a plaintiff plead "a short plain statement" of "the grounds on which jurisdiction depends" and a "statement of the claim showing that the pleader is entitled to relief." This Court has held that this liberal notice pleading standard applies to *all* civil cases unless the Federal Rules or an act of Congress expressly provide otherwise. In *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 507 U.S. 163 (1993), and *Swierkiewicz*, the Court prohibited federal courts from imposing pleading standards that are not explicitly authorized by the Federal Rules. See also *Conley*, 355 U.S. at 47 (a plaintiff need not set out his claim in detail unless Federal Rules require it). With respect to actions governed by the PLRA, neither the Federal Rules nor the PLRA imposes *any* pleading requirement beyond the basics prescribed by Rule 8(a), see *supra* Part II(A) – much less, the heightened pleading standard adopted by the Sixth and Tenth Circuits. By requiring PLRA plaintiffs to satisfy a heightened pleading

standard notwithstanding the lack of statutory authority, the Sixth and Tenth Circuits have disregarded this Court's clear precedent.

In *Leatherman*, the Court reversed the Fifth Circuit's imposition of a more demanding pleading standard in actions alleging municipal liability under 42 U.S.C. 1983. 507 U.S. at 167. The Court explained that while "the Federal Rules do address in Rule 9(b) the question of the need for greater particularity in pleading certain actions, [they] do not include among the enumerated actions any reference to complaints alleging municipal liability under § 1983." *Id.* at 168. As a result, this Court unanimously held that Rule 8(a)'s notice pleading standard alone governs such complaints and vacated the Fifth Circuit's decision. *Ibid.*

The Court reiterated this rule in *Swierkiewicz*, in which it also rejected a heightened pleading requirement for employment discrimination complaints brought under Title VII. 534 U.S. at 508. The Second Circuit (5 Fed. Appx. 63, 65 (CA2 2001)) had held that those complaints must contain specific facts establishing a *prima facie* case of discrimination under the framework set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). This Court reversed the Second Circuit's decision, in part because the judicially-created heightened pleading standard conflicted with Rule 8(a). 534 U.S. at 512. Referring to *Leatherman*, a unanimous Court held:

> Rule 8(a)'s simplified pleading standard applies to all civil actions, with limited exceptions. Rule 9(b), for example, provides for greater particularity in all averments of fraud or mistake. This Court, however, has declined to extend such exceptions to other contexts. * * * Just as Rule 9(b) makes no mention of municipal liability under

> * * * 42 U.S.C. § 1983, neither does it refer to employment discrimination. Thus, complaints in these cases, as in most others, must satisfy only the simple requirements of Rule 8(a).

Id. at 513 (footnotes omitted). The Court concluded that "[a] requirement of greater specificity for particular claims is a result that 'must be obtained by the process of amending the Federal Rules, and not by judicial interpretation.'" *Id.* at 515 (quoting *Leatherman*, 507 U.S. at 168).

Just as Rule 9(b) does not mention municipal liability actions under § 1983 (*Leatherman*) or employment discrimination actions (*Swierkiewicz*), it does not mention PLRA actions.[16] But despite this Court's clear holdings, the Sixth and Tenth Circuits have imposed a heightened pleading standard in PLRA actions that conflicts directly with this Court's decisions in *Leatherman* and *Swierkiewicz*.[17]

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[16] As noted earlier, *supra* Part II(A), Rule 9(c) does not require exhaustion to be pleaded. Even if it did, however, it would not sanction the Sixth and Tenth Circuit's heightened pleading rule. See Wright & Miller, *supra*, § 1302 (noting that Rule 9(c)'s purpose was "to *eliminate* the detailed and largely unnecessary averments that resulted under the common law procedure, and to prevent nonmeritorious dismissals for a failure to plead the fulfillment of conditions precedent that are not at issue in the suit or simply are overlooked accidentally by the pleader." (emphasis added)).

[17] At the petition-stage, respondents attempted to distinguish *Swierkiewicz* on the basis that it was an employment discrimination case in which the court of appeals required the plaintiff to plead facts establishing a prima facie case of discrimination under the *McDonnell Douglas*, framework. 05-7058 BIO at 6. Respondents argued that, unlike the *McDonnell Douglas* framework, the PLRA requires prisoner plaintiffs to plead exhaustion. *Id.* at 6-7. This attempt to distinguish *Swierkiewicz* founders on its premise, as it improperly assumes that the PLRA requires prisoner plaintiffs to plead exhaustion in the first place. See *supra* Parts II(A), (B).

The Sixth and Tenth Circuits' attempts to distinguish *Swierkiewicz* are unpersuasive. Both courts have asserted that their adopted pleading standard "do[es] not amount to a judicially-created heightened pleading requirement," *Steele*, 355 F.3d at 1210; see also *Baxter*, 305 F.3d at 490, and "'does not take its authority from the Federal Rules of Civil Procedure, but from the Prison Litigation Reform Act,'" *Steele*, 355 F.3d at 1211 (quoting *Baxter*, 305 F.3d at 490); see also *Knuckles-El v. Toombs*, 215 F.3d 640, 642 (CA6), cert. denied, 531 U.S. 1040 (2000) (asserting that a heightened pleading standard is necessary to "effectuate" the PLRA's exhaustion requirement). Congress, however, has not imposed any such pleading requirement. Instead, Congress has simply imposed an exhaustion requirement. The Sixth and Tenth Circuit's imposition of an extra-statutory heightened pleading requirement that they believe somehow advances the PLRA's purpose cannot be tolerated, lest there be no limits to the judicial gloss that courts could impose on a statute. See *Crawford El v. Britton*, 523 U.S. 574, 585, 594 (1998) (holding that a prisoner should not be subjected to heightened pleading and proof standards in a case involving the defendants' intent because it "would stray far from the traditional limits on judicial authority" to change standards of pleading and proof on the basis of policy concerns alone).

D. The Sixth Circuit's Heightened Pleading Rule Is Exacerbated by Its Equally Unauthorized Rule Forbidding Amendments of Complaints to Cure Any Deficiencies in Pleading Exhaustion

Under the Federal Rules, "[a] party may amend the party's pleading once as a matter of course at any time before a responsive pleading is served. * * * Otherwise a party may amend the party's pleading only by leave of

court or by written consent of the adverse party; and leave shall be freely given when justice so requires." Fed. R. Civ. P. 15(a). "Perhaps the most common use of Rule 15(a) is by a party seeking to amend in order to cure a defective pleading." 6 Wright & Miller, *supra*, § 1474. In *Foman v. Davis*, 371 U.S. 178, 182 (1962), this Court explained that Rule 15(a)'s "leave shall be freely given" "mandate is to be heeded." "[O]utright refusal to grant the leave without any justifying reason appearing for the denial * * * is [an] abuse of * * * discretion and inconsistent with the spirit of the Federal Rules." *Ibid.*

Yet, the Sixth Circuit's blanket rule barring amendment whenever a prisoner "fails to make a sufficient allegation of exhaustion in their initial complaint,"[13] *Baxter*, 305 F.3d at 489, is precisely the sort of "outright refusal * * * without any justifying reason" that *Foman* forbids, 371 U.S. at 182. *Baxter*'s only justification for its rule was a brief discussion of its prior decision in *McGore v. Wrigglesworth*, 114 F.3d 601 (CA6 1997). *Baxter*, 305 F.3d at 489 & n.3. In *McGore*, the Sixth Circuit relied on the "shall dismiss" language in the PLRA's screening

[13] Although no other court of appeals has specifically addressed whether dismissal for failure to sufficiently plead exhaustion requires leave to amend, every court of appeals to consider dismissal under various other PLRA dismissal provisions has held that leave to amend is required. See *Cruz v. Gomez*, 202 F.3d 593, 597-98 (CA2 2000); *Grayson v. Mayview State Hosp.*, 293 F.3d 103, 109-14 (CA3 2002); *Bazrowx v. Scott*, 136 F.3d 1053, 1054 (CA5 1998); *Lopez v. Smith*, 203 F.3d 1122, 1127 (CA9 2000) (en banc); *Perkins v. Kansas Dept. of Corrections*, 165 F.3d 803, 806 (CA10 1999); *Brown v. Johnson*, 387 F.3d 1344, 1348-49 (CA11 2004); *Davis v. Dist. of Columbia*, 158 F.3d 1342, 1349 (CADC 1998). The fact that no other court of appeals has addressed whether dismissal for failure to sufficiently plead exhaustion requires leave to amend is not surprising, given that the Sixth Circuit is one of only three circuits to require a PLRA plaintiff to plead exhaustion in the first place. See *supra* note 14.

provisions, 28 U.S.C. 1915(e)(2) and 1915A, to hold that prisoners may not amend their complaints to cure pleading defects. 114 F.3d at 612 ("Under the Prison Litigation Reform Act, courts have no discretion in permitting a plaintiff to amend a complaint to avoid sua sponte dismissal."). But like *Baxter*, *McGore* provides no reasoning for its holding; it appears that the Sixth Circuit simply assumed that the authority to dismiss a complaint *sua sponte* carries with it a prohibition on allowing a plaintiff to fix defects.

That the Sixth Circuit has not attempted to explain the basis for its rule is not surprising; the rule is indefensible. As discussed above, Congress carefully declined to include failure to plead exhaustion among § 1997e(c)'s grounds for dismissal. See *supra* Part II(B). Sections 1915(e)(2)'s, 1915A's, and 1997e(c)'s dismissal provisions are meaningfully indistinguishable except that § 1915(e)(2) additionally allows *sua sponte* dismissal if an *in forma pauperis* plaintiff's "allegation of poverty is untrue" and § 1915A contains a timing requirement that district courts screen PLRA complaints "before docketing, if feasible or, in any event, as soon as practicable after docketing." Accordingly, there is nothing in either § 1915(e)(2) or § 1915A that, unlike § 1997e(c), would support *McGore*'s unexplained reliance on them to justify a blanket "no amendment" rule.[19]

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[19] The sparse legislative history regarding the PLRA's screening provisions confirms that Congress did not intend to make failure to exhaust one of the grounds on which a complaint may be dismissed under any of the PLRA's screening provisions. The only references to the PLRA's dismissal provisions in the statute's entire legislative history are two floor statements by Senator Dole, one floor statement by Representative Canady, and three statements in a House Judiciary Committee report on H.R. 667, 104th Cong. (1995), Titles II and III of which, with some modifications not germane here, became the PLRA. *None* of these statements indicate that any involved member of Congress understood failure to exhaust to be among the grounds on

(Continued on following page)

But even if Congress intended to treat failure to plead exhaustion as a ground for dismissal by construing it as failure to state a claim, nothing in the PLRA's dismissal provisions would deprive district courts of their traditional discretion to grant leave to amend following dismissal for failure to state a claim. The language of each of the PLRA's dismissal provisions as they apply to failures to state a claim mirrors Federal Rule of Civil Procedure 12(b)(6)'s language.[20] And in dismissing a complaint under Rule 12(b)(6), the long-standing federal tradition has been to grant leave to amend unless it is *certain* from the complaint that amendment would be futile. 5B Wright & Miller, *supra*, § 1357 ("[T]he district court normally will give the plaintiff leave to file an amended complaint to see if the shortcomings of the original document can be corrected. This is true even when the district judge doubts that the plaintiff will be able to overcome the shortcomings in the initial pleading. * * * [L]eave to amend the complaint

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which a district court may dismiss a complaint at the screening stage. See H.R. Rep. No. 104-21, at 7 (1995) ("[I]t requires the court to dismiss any prisoner suit if it fails to state a claim of a violation for which relief can be granted, or if the suit is frivolous or malicious."); *id.* at 22 (similar); *id.* at 32 (similar); 141 Cong. Rec. H14106 (daily ed. Dec. 6, 1995) (statement of Rep. Canady) ("Title VIII will require a Federal court to dismiss, on its own motion, lawsuits which do not state a claim upon which relief may be granted or are frivolous or malicious."); 141 Cong. Rec. S14414 (daily ed. Sep. 27, 1995) (statement of Senator Dole) ("Another provision of the Prison Litigation Reform Act would require judicial screening, before docketing, of any civil complaint filed by a prisoner seeking relief from the Government [and] would allow a Federal judge to immediately dismiss a complaint if either of two conditions is met: First, the complaint does not state a claim upon which relief may be granted, or second, the defendant is immune from suit."); 141 Cong. Rec. S7525 (daily ed. May 25, 1995) (statement of Senator Dole) (similar).

[20] Compare 28 U.S.C. 1915(e)(2)(B)(ii), 1915(g), 1915A(b)(1), and 42 U.S.C. 1997e(c)(1) and (2), with Fed. R. Civ. P. 12(b)(6).

should be refused only if it appears to a certainty that the plaintiff cannot state a claim."). Absent any evidence of congressional intent to do so, it "[can]not lightly to be assumed that Congress intended to depart from [this] long established policy." *Robertson v. Railroad Labor Bd.*, 268 U.S. 619, 627 (1925).

Moreover, the Sixth Circuit's "no amendment" rule contravenes the policies that underlie Rule 15(a). This Court requires a sufficient basis for denial of leave to amend because the purpose of pleading under the Federal Rules of Civil Procedure is "to facilitate a proper decision on the merits," not to set the stage for "a game of skill in which one misstep by counsel may be decisive to the outcome." *Foman*, 371 U.S. at 181-82. Yet subjecting petitioner Jones, a *pro se* prisoner, to a game of skill is precisely what the court of appeals did here by refusing leave to amend notwithstanding that proof that he exhausted his claims against at least respondents Morrison and Opanasenko was present in the record by the time his case was referred to the magistrate judge for evaluation. JAI 33-38.

E. Congress Did Not Repeal by Implication or Impliedly Supersede Federal Rules of Civil Procedure 8 and 15 with Respect to PLRA Complaints

In *Baxter*, the Sixth Circuit further asserted that its heightened pleading standard is authorized by the PLRA's screening provision codified at 28 U.S.C. 1915A and that requiring prisoners to plead exhaustion with specificity will prevent them from manipulating liberal pleading standards to avoid early dismissal of their unexhausted

claims.[21] *Baxter*, 305 F.3d at 490 ("Courts would be unable to screen cases effectively if plaintiffs were able, through ambiguous pleading, to avoid dismissal of claims on which relief could not be granted."). Critically, however § 1915A changes nothing but the *timing* for evaluating a prisoner's complaint. Nothing in § 1915A purports to change what a prisoner must *allege* to survive that evaluation.

Nonetheless, at the petition-stage, respondents seized on the Sixth Circuit's assertions and boldly argued that § 1915A conflicts with and, therefore, impliedly repealed and supersedes Federal Rules of Civil Procedure 8 and 15 with respect to PLRA complaints.[22] 05-7058 BIO at 2-8. In doing so, they recognized – as they must – that "[i]t is * * * a cardinal rule of statutory construction that repeals by implication are not favored * * * [and that] the intention of the legislature to repeal must be clear and manifest." *Id.* at 4-5 (quoting *Radzanower v. Touche Ross & Co.*, 426 U.S.

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[21] If the justification for imposing a heightened pleading requirement is simply to facilitate § 1915A screening, then there is no principled reason for limiting this requirement to exhaustion. Under the Sixth Circuit's faulty logic, prisoners would have the burden to anticipate *all* possible affirmative defenses to their claims and be required to plead *all* allegations with particularity. It is no surprise that no court has embraced such a view.

[22] To our knowledge, no court has been so bold as to embrace this repeal by implication argument, and for good reason. Respondents' argument is of the same ilk as the argument that the Court rejected in *Swierkewicz*. See 534 U.S. at 514-15 ("Respondent argues that allowing lawsuits based on conclusory allegations of discrimination to go forward will burden the courts and encourage disgruntled employees to bring unsubstantiated suits. * * * Whatever the practical merits of this argument, * * * [a] requirement of greater specificity for particular claims is a result that 'must be obtained by the process of amending the Federal Rules, and not by judicial interpretation.'" (citation omitted)).

Nor has any court complained that it cannot screen cases effectively under the standards of Rules 8 and 15, notwithstanding that courts have had ten years since the PLRA's enactment to do so.

148, 154 (1976)); see also *United States v. Welden*, 377 U.S. 95, 102 n.12 (1964). The requirement that intent to repeal must be clear and manifest makes sense because "Congress understands the state of existing law when it legislates," *Bowen v. Massachusetts*, 487 U.S. 879, 896 (1988), and "[i]t is not lightly to be assumed that Congress intended to depart from a long established policy," *Robertson*, 268 U.S. at 627. Accordingly, "[w]here there is no clear intention" to repeal or supersede, one statute will not be given priority over another statute or rule, "regardless of the priority of enactment." *Morton v. Mancari*, 417 U.S. 535, 550-51 (1974). Critically, neither § 1915A's text nor operation evidences a "clear intention" to repeal or supersede Rules 8 or 15.

This Court has acknowledged "two well-settled categories of repeals by implication." *Kremer v. Chemical Constr. Co.*, 456 U.S. 461, 468 (1982) (quoting *Radzanower*, 426 U.S. at 154). "An implied repeal will only be found [1] where provisions in two statutes are in irreconcilable conflict, or [2] where the latter Act covers the whole subject of the earlier one and is clearly intended as a substitute." *Branch v. Smith*, 538 U.S. 254, 273 (2003) (plurality opinion) (internal quotation marks and citations omitted).

Section 1915A and Rules 8 and 15 are not in "irreconcilable conflict." *Id.*

> It is not enough to show that the two statutes produce differing results when applied to the same factual situation, for that no more than states the problem. Rather, "when two statutes are capable of co-existence, it is the duty of the courts * * * to regard each as effective." * * * "Repeal is to be regarded as implied only if necessary to make the (later enacted law) work, and even then only to the minimum extent necessary.

> This is the guiding principle to reconciliation of the two statutory schemes."

Radzanower, 426 U.S. at 155 (quoting *Morton*, 417 U.S. at 551; *Silver v. New York Stock Exchange*, 373 U.S. 341, 357 (1963)).

The PLRA and Rules 8 and 15 are plainly capable of co-existence because nothing in Rules 8 or 15 inhibit the operation of the PLRA and its screening provision. The PLRA's screening provision, like § 1997e(c)(1), provides that a district court "shall * * * dismiss" claims that are "frivolous, malicious, or fail[] to state a claim upon which relief may be granted; or * * * seek[] monetary relief from a defendant who is immune from such relief." 28 U.S.C. 1915A. Nowhere does § 1915A indicate that district courts are commanded to screen and dismiss without leave to amend for failure to exhaust administrative remedies. Indeed, as discussed earlier, § 1997e, the provisions of which govern both dismissal and exhaustion of administrative remedies, expressly distinguishes the § 1915A early dismissal grounds from dismissal for failure to exhaust administrative remedies. See *supra* Part II(B). Just as any reading of dismissal for failure to exhaust into § 1997e(c)(1) would be illogical and violate the rule against superfluities and *expressio unius* statutory-construction canon, reading dismissal for failure to exhaust into § 1915A would too. See *supra* Part II(B).

When § 1915A is properly read, (1) it requires only that a prisoner plaintiff plead "a short and plain statement," Fed. R. Civ. P. 8(a), establishing that his or her claim is not "frivolous, malicious, * * * fails to state a claim upon which relief may be granted; or * * * seeks monetary relief from a defendant who is immune from such relief," 28 U.S.C. 1915A, and (2) allows "leave [to amend to] be freely given," Fed. R. Civ. P. 15(a), unless the district court is *certain* the prisoner's claim is incurable. Since it is

possible for § 1915A and Rules 8 and 15 "to coexist in this manner," "they are not so repugnant to each other to justify a finding of an implied repeal by this Court." *Radzanower*, 426 U.S. at 156-57; see also *Kremer*, 456 U.S. at 471 ("Since an implied repeal must ordinarily be evident from the language or operation of a statute, the lack of such manifest incompatibility between [two provisions in apparent tension] is enough to end [this Court's] inquiry.").

Nor does Congress' enactment of § 1915A fall within the second category of repeals by implication because § 1915A does not "cover[] the whole subject of" federal pleading procedure. *Radzanower*, 426 U.S. at 157. Perhaps even more importantly, Congress could not have intended § 1915A to repeal Rules 8 and 15 by implication because, under either test, Congress did not "clear[ly] and manifest[ly]" intend to repeal Rules 8 and 15's applicability to PLRA suits. Neither the PLRA nor its legislative history indicates any intention to repeal – much less, even mention – Rule 8 or 15.

F. The Sixth Circuit's Heightened Pleading Requirement and "No Amendment" Rule Do Not Advance the Policies Underlying the PLRA

Where the statutory language and structure answer an interpretation question – as the PLRA's language and structure do here – resort to policy evaluation is inappropriate. See *Alexander v. Sandoval*, 532 U.S. 275, 286-87 (2001) (noting that "[s]tatutory intent * * * is determinative" and that it will not be disregarded "no matter how desirable that might be as a policy matter"). But even if this Court were to take policy considerations into account, such considerations support rejection – rather than

endorsement – of the Sixth Circuit's heightened pleading and "no amendment" rules.

Neither the Sixth Circuit's heightened pleading requirement nor its "no amendment" rule advance Congress' goal of "improv[ing] the quality of prisoner suits," *Porter*, 534 U.S. at 524, because, like all of the Sixth Circuit's procedural rules at issue in these cases, they fall equally on meritorious and non-meritorious claims. Similarly, the Sixth Circuit's heightened pleading and "no amendment" rules do not advance the purpose to "afford[] corrections officials time and opportunity to address complaints internally" before suit is filed, *id.* at 524-25, because the rules have nothing to do with whether a prisoner's claims were actually exhausted. Rather, they simply present "a trap [for] the unwary pro se prisoner" without regard to the underlying claims' merit or to considerations of whether the claims were actually exhausted. *Slack*, 529 U.S. at 487 (internal quotations omitted). Even prisoners who pore over the pleading requirements of the Federal Rules will not know that they are required to document exhaustion or plead it with particularity until their complaint has already been dismissed and, under Sixth Circuit rules, it is too late to do anything about it.

Nor do these rules necessarily "reduce the quantity * * * of prisoner suits." *Porter*, 534 U.S. at 524. Instead, they "tend[] to increase, rather than to alleviate, the caseload burdens on * * * federal courts" because they require a prisoner to re-file a new complaint in a new suit with exhaustion sufficiently alleged or proven by attachments, even though the prisoner's non-compliance with the heightened pleading rule could be easily cured by an amended complaint. *Rose*, 455 U.S. at 522 (Blackmun, J., concurring in judgment). That new suit, based on whatever administrative record the prison system may have

already made, will impose duplicative filing, docketing, and processing costs on the system and require the court to re-familiarize itself with a case that has already undergone judicial scrutiny. See *id.* at 527-28 (Blackmun, J., concurring in judgment) (recognizing that "[i]n many cases a decision on the merits [of an exhausted claim] will involve only negligible additional effort," whereas requiring a prisoner to re-file his petition would result in "duplicative examination of the record and consideration of the exhausted claims – perhaps by another district judge").

Moreover, not only do the rules contravene this Court's oft-repeated admonition that "prisoner complaints * * * are held to less stringent standards than formal pleadings drafted by lawyers," *Hughes*, 449 U.S. at 9-10 (quotation omitted), they victimize *pro se* prisoners by punishing their technical mistakes. The ramifications of dismissing and requiring re-filing of exhausted but insufficiently pleaded claims are substantial and in effect punitive for prisoners. In addition to often being uneducated, unsophisticated, and legally inexperienced, prisoners are almost invariably poor. The fee for filing a new civil action in federal court is $350. 28 U.S.C. 1914(a). It scarcely needs to be noted that the vast majority of prisoners have great difficulty paying one filing fee, let alone multiple fees for each suit that is dismissed because of a technical pleading error.

The filing fee requirement applies even to prisoners granted leave to proceed *in forma pauperis*; indigent status simply allows prisoners to pay the filing fee in increments. 28 U.S.C. 1915(a)(2), (b). Moreover, the dismissal may constitute a "strike" for purposes of the PLRA's "three strikes" rule, which prevents prisoners who have had three actions or appeals dismissed for failure to state a claim, among other reasons, from filing *in forma pauperis*. 28 U.S.C. 1915(g). Although the circuits are

divided over whether dismissal for failure to exhaust constitutes a strike, a heightened pleading rule – if adopted by this Court – would be in effect even more punitive in the "non-exhaustion is a strike" jurisdictions. Compare *Steele*, 355 F.3d at 1213 (CA10 – non-exhaustion may be a strike) (dictum), and *Rivera*, 144 F.3d at 731 (CA 11 – non-exhaustion is a strike), with *Snider*, 199 F.3d at 111 (CA2 – non-exhaustion is not a strike); *Green v. Young*, 454 F.3d 405, 408-09 (CA4 2006) (same); and *Andrews v. King*, 398 F.3d 1113, 1120 (CA9 2005) (same). With these deterrents against filing non-compliant lawsuits already in place, there is no need to create another by reading a heightened pleading requirement incapable of cure by amendment into the PLRA's exhaustion provision, which was plainly not intended to have such a punitive or deterrent effect.

Finally, there is good reason to require prison officials to bear the burden of pleading exhaustion: They have greater ability to plead accurately about administrative exhaustion. E.g., *Wyatt*, 315 F.3d at 1119. Prison officials have lawyers and better access to prison records than prisoners.[23] E.g., *Ray*, 285 F.3d at 295. With their access to prison records, they are better equipped to provide courts with documentation and explanations of administrative proceedings. E.g., *ibid.*

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[23] For example, the Michigan Department of Corrections (MDOC) maintains copies of prisoner grievances so that they may be accessed "to respond to a request under the Freedom of Information Act, to respond to a request from the Office of Legislative Corrections Ombudsman, the Department of Attorney General or appropriate Central Office staff, for audits, or for statistical reporting." MDOC Policy Directive (PD) No. 03.02.130 ¶ (I) (Nov. 1, 2000). And, in certain facilities, the MDOC maintains a computerized grievance tracking system. *Id.* ¶¶ (Q)(1), (S)(1). Accordingly, it is unsurprising that respondents had no difficulty attaching to their motion to dismiss petitioner Jones' complaint the proof of exhaustion that the court of appeals faulted Jones for not providing with his complaint.

III. THE SIXTH CIRCUIT'S REQUIREMENT THAT PRISONERS IDENTIFY ALL POTENTIAL DEFENDANTS AT STEP ONE OF THEIR PRISON GRIEVANCE GOES BEYOND THE PLRA'S EXHAUSTION REQUIREMENT AND IS CONTRARY TO ESTABLISHED PRINCIPLES OF FEDERAL PLEADING PROCEDURE AND ADMINISTRATIVE LAW

A. The Sixth Circuit's "Name All Defendants" Rule Is Unsupported by the PLRA's Text and Inconsistent with the Federal Rules of Civil Procedure and Congress' Intention to Provide Prison Officials Notice of *Problems*

The Federal Rules of Civil Procedure reflect a policy of allowing free amendment of complaints, see Fed. R. Civ. P. 15(a) ("leave [to amend] shall be freely given"), and permissive joinder of parties up to the applicable limitations period, see Fed. R. Civ. P. 20 ("All persons * * * may be joined in one action as defendants if there is asserted against them jointly, severally, or in the alternative, any right to relief in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all defendants will arise in the action"), and, in some cases, beyond, see Fed. R. Civ. P. 15(c)(3) (permitting amendment to name misnamed party to relate back to before the limitations expired). These rules acknowledge the difficulty that a litigant may face in marshaling the identities of all the individuals he wishes to sue and accommodate that difficulty by allowing a litigant to plead new claims and name additional defendants after discovery has sharpened the facts and issues.

The Sixth Circuit's blanket rule that prisoners are required to have identified a particular person in their Step I administrative grievance in order to sue that person

in subsequent litigation, see *Thomas v. Woolum*, 337 F.3d 720, 734, 735 (CA6 2003) (prisoners must "file grievances 'against' specific defendants" but "need not identify each officer by name when the identities of the particular officers are unknown"); *Burton v. Jones*, 321 F.3d 569, 575 (CA6 2003) ("[F]or a court to find that a prisoner has administratively exhausted a claim against a particular defendant, a prisoner must have alleged mistreatment or misconduct on the part of the defendant at Step I of the grievance process."); *Curry v. Scott*, 249 F.3d 493, 505 (CA6 2001) ("[A] prisoner [must] file a grievance against the person he ultimately seeks to sue."), represents a radical departure from the Federal Rules' flexible pleading tradition by freezing the universe of potential defendants the day that a prisoner files a Step I grievance.

Making the rule even more restrictive are (1) nearly uniformly short grievance deadlines, see Brief for Jerome N. Frank Legal Services Organization of the Yale Law School as *Amicus Curiae* Supporting Respondent at App. 1-5, *Woodford v. Ngo*, 126 S.Ct. 2378 (No. 05-416), and (2) § 1983's ban on *respondeat superior* liability, see *Polk County v. Dodson*, 454 U.S. 312, 325 (1981), and rigorous requirement of personal involvement, see, e.g., *Williams v. Smith*, 781 F.2d 319, 323-24 (CA2 1986) (acknowledging sufficient personal involvement for § 1983 supervisory liability where defendant (1) after learning of violation through report or appeal, failed to remedy the wrong; (2) created policy or custom under which unconstitutional practices occurred or allowed such policy or custom to continue; or (3) was grossly negligent in managing subordinates who caused unlawful condition or event). In cases other than those involving a face-to-face encounter, discerning the identities or job descriptions of officials responsible for alleged civil rights violations will be nearly

impossible within typical deadlines for filing Step I grievances.

Absent some indication to the contrary, Congress could not have intended to insulate so many prison officials from potential liability by effectively repealing Rules 15(a), 20, and 15(c) with respect to PLRA suits. See, e.g., *Radzanower*, 426 U.S. at 154; see also *supra* Part II(E) (applying repeal by implication test). Neither the statute nor its legislative history say anything about naming all of the individual perpetrators of a claimed civil rights violation during the prison grievance process. Accordingly, it is not surprising that neither the Sixth Circuit nor the one other circuit that appears to have a similar rule – the Eighth Circuit, *Kozohorsky v. Harmon*, 332 F.3d 1141, 1143 (2003) – have offered any textual support for their path-breaking rule.

In contrast to the Sixth Circuit's rule, a rule simply requiring notice of the problem being grieved would vindicate Congress' intent while avoiding any tension with the Federal Rules. This Court has repeatedly recognized that one of Congress' primary objectives in requiring PLRA exhaustion is providing prison officials notice of and an opportunity to address *the problem* that will later form the basis of the lawsuit, see *Ngo*, 126 S.Ct. at 2385 ("Exhaustion gives an agency 'an opportunity to correct its own mistakes with respect to the programs it administers before it is haled into federal court.'" (quoting *McCarthy*, 503 U.S. at 145)); see also *Porter*, 534 U.S. at 524-25 (holding that PLRA exhaustion "afford[s] corrections officials time and opportunity to address complaints internally before allowing the initiation of a federal case"), not to give notice to particular defendants that the prisoner plans to sue them. Faithful to this purpose, the Fifth Circuit has rejected the Sixth Circuit's blanket "name all defendants" rule and instead held properly that "[i]n

deciding how much detail is required in a given case * * * a grievance should be considered sufficient to the extent that the grievance gives officials a fair opportunity to address *the problem* that will later form the basis of the lawsuit." *Johnson v. Johnson*, 385 F.3d 503, 516-17 (CA5 2004) (emphasis added); see also *Johnson v. Testman*, 380 F.3d 691, 697 (CA2 2004) ("[I]nmates must provide enough information about the conduct of which they complain to allow prison officials to take appropriate responsive measures.").

Requiring prisoners to provide notice of the problem is also consistent with how prison grievances are resolved generally and in the MDOC specifically. As *amici* have shown, "prison officials do not decide grievances based solely on the characterization of who is responsible for the problem. Grievance policies overwhelmingly provide for investigation of prisoners' complaints." Brief of American Civil Liberties et al. as *Amici Curiae* at 12. The MDOC expressly requires at Step I that "[t]he grievant * * * be interviewed," PD ¶ (AA), that "[t]he grievant * * * have the opportunity to explain the grievance more completely at the interview," *ibid.*, and "that a thorough investigation of the grievance is completed" *id.* ¶ (Q)(4). At Step II, the MDOC allows "further investigation * * * as needed." *Id.* ¶ (S)(4).

The results of the MDOC's investigations in petitioner Walton's and petitioner Williams' cases confirm that the MDOC does not rely solely on the information provided on the Step I grievance form. At Step I, Walton named only respondent Bobo because that is whom Walton believed issued him the indefinite upper slot restriction. JAII 65. The MDOC's Step I response indicated, however, that respondent Gearin – not respondent Bobo – issued Walton the indefinite upper slot restriction. *Id.* at 66. The same is true in petitioner Williams' case. Williams' Step I denial of

surgery grievance did not name anyone. JAII 9. Nonetheless, the MDOC was able to identify in its Step II response defendant Pramstaller, JAII 15, who was responsible for denying Williams' surgery request, JAI 85. Accordingly, any claim – such as the claim levied by respondents at the petition stage, see 02-7142 BIO at 6 – that individuals must be identified in a Step I grievance for a prison to have "an opportunity to correct its own mistakes," *Ngo*, 126 S.Ct. at 2385, is belied by reality.

B. The Sixth Circuit's Imposition of an Exhaustion Requirement Beyond That Required by the Prison Grievance System Cannot Be Squared with *Sims v. Apfel*

The grievance procedures with which petitioners Williams and Walton had to comply required only that they "be as specific as possible" "limited to the issue being grieved." PD ¶ (U) (emphasis added). Similarly, the form they had to fill out directed them to "[b]e brief and concise in describing [the] grievance issue." E.g., JAII 1 (emphasis added). Neither the MDOC's grievance procedures nor the form required them to identify any individuals whom they believed responsible for violating their rights. Nonetheless, the court of appeals dismissed their claims because they failed to identify in their Step I grievances the individuals that they subsequently sued.

This Court in *Sims v. Apfel*, 530 U.S. 103 (2000), rejected just such an attempt by the judiciary to impose technical exhaustion requirements on an informal administrative process from which they are absent. In *Sims*, the plaintiff challenged the denial of her application for social security and disability benefits. She filed a lawsuit after utilizing the administrative procedures made available by the Social Security Act. *Id.* at 105. The Fifth Circuit

affirmed the dismissal of her claim because, although she exhausted her administrative remedies, her lawsuit challenging the denial of her benefits was based on issues not raised during the administrative process. *Id.* at 106.

This Court reversed, holding that the Fifth Circuit's requirement that a plaintiff exhaust her challenge to the denial of benefits through the administrative review system before filing a lawsuit did not explicitly require "issue exhaustion." *Id.* at 111-12. The Court explained that "the desirability of a court imposing a requirement of issue exhaustion depends on the degree to which the analogy to normal adversarial litigation applies in a particular administrative proceeding." *Id.* at 109. The Social Security proceedings at issue were inquisitorial rather than adversarial because they were before an administrative law judge, with no separate representative advocating the Commissioner's position, and many claimants are unrepresented or represented by non-attorneys. Justice Thomas, writing for a four-Justice plurality, explained "that a judicially created issue-exhaustion requirement was inappropriate" in light of the informal, non-adversarial nature of the administrative proceedings, *id.* at 111-12.

While *Sims* involved a different kind of administrative exhaustion, its underlying premise is equally applicable here. The MDOC's grievance procedures provide for the filing of an initial grievance within seven days of the grievable incident, and for an investigation and disposition within fifteen days thereafter. PD ¶¶ (T), (Y), (CC). A prisoner may appeal an unsatisfactory response to within five days, and prison officials must resolve the appeal within fifteen days thereafter. *Id.* ¶¶ (DD), (FF). A prisoner then has ten days to file a final administrative appeal. *Id.* ¶ (GG). The procedures require an informal interview but not hearings. *Id.* ¶ (AA). It is difficult to imagine an administrative proceeding that is less akin to adversarial

litigation than the prison grievance procedures at issue here. See *Cleavinger v. Saxner*, 474 U.S. 193, 196 (1985). Given the nature of the administrative process for resolving prison grievances, the Sixth Circuit's rule cannot be reconciled with *Sims*.

C. The Sixth Circuit's "Name All Defendants" Rule Is Incompatible with This Court's "Proper Exhaustion" Framework

The PLRA's exhaustion provision says simply that prisoners suing over prison conditions should exhaust available administrative remedies. "Exhaust," as a matter of common sense and definition, means to follow an administrative process to its end. 5 Oxford English Dictionary 534 (2d ed. 1989) ("To use up completely (either a material or immaterial thing); to expend the whole of; to consume entirely."). This Court has explained, based on the administrative law understanding that Congress had in mind when it enacted the PLRA, that the statute requires "proper exhaustion * * * which 'means using all steps that the agency holds out, and doing so *properly* (so that the agency addresses the issues on the merits).'" *Ngo*, 126 S.Ct. at 2385 (quoting *Pozo*, 286 F.3d at 1024).

That is exactly what petitioners did. They filed grievances in compliance with MDOC procedure; they received decisions on the merits; and in no case did the grievance system reject a grievance or appeal or indicate it could not reach the merits because they failed to provide sufficient information. Under *Ngo*, those facts are dispositive on the question of exhaustion.[24] The same conclusion follows from

[24] The reverse may not be true in all cases. *Ngo* made clear that it did not address situations where procedural rules were designed to hoodwink prisoners, 126 S.Ct. at 2392-93, and Justice Breyer noted

(Continued on following page)

considering the purposes of the exhaustion requirement, as identified by this Court: "to 'affor[d] corrections officials time and opportunity to address complaints internally before allowing the initiation of a federal case,' . . . [and] to 'reduce the quantity and improve the quality of prisoner suits.'" *Ngo*, 126 S.Ct. at 2387. The latter may be accomplished by creating an administrative record. *Id.* at 2388. Where, as here, prisoners have used the administrative process, prison officials have heard and ruled on their claims, and have made whatever record they deem appropriate, the purposes as well as the language of § 1997e(a) are satisfied.

This conclusion has been made explicit by circuits that adopted a "proper exhaustion" framework before *Ngo*. These courts agree that if prison authorities hear and address the merits of a grievance, the exhaustion requirement is satisfied regardless of procedural defects that may be cited in subsequent litigation. See *Spruill v. Gillis*, 372 F.3d 218, 234 (CA3 2004) ("[T]he prison can excuse an inmate's failure to [name someone in his grievance] by identifying the unidentified persons and acknowledging that they were fairly within the compass of the prisoner's grievance"); *Gates v. Cook*, 376 F.3d 323, 331 n.6 (CA5 2004) (noting that officials had decided the grievance despite plaintiff's sending it to the wrong official); *Barnes v. Briley*, 420 F.3d 673, 679 (CA7 2005) (holding claim was not procedurally defaulted where an initial grievance was rejected as untimely but plaintiff later "restarted" the grievance process and received a decision on the merits); *Ross*, 365 F.3d at 1186 (CA10) ("If a prison accepts a

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that administrative and habeas law "contain[] well established exceptions" to exhaustion requirements. *Id.* at 2393 (Breyer, J., concurring in judgment) (citing *Giano v. Goord*, 380 F.3d 670, 677 (CA2 2004); *Spruill*, 372 F.3d at 232).

belated filing, and considers it on the merits, that step makes the filing proper for purposes of state law and avoids exhaustion, default, and timeliness hurdles in federal court"). That proposition is especially apposite here, where respondents have not relied upon any failure by petitioners to comply with the requirements of the grievance system.

IV. THE PLRA EXHAUSTION REQUIREMENT DOES NOT REQUIRE THE SIXTH CIRCUIT'S "TOTAL EXHAUSTION" RULE UNDER WHICH PROPERLY EXHAUSTED CLAIMS MUST BE DISMISSED BECAUSE OF THE PRESENCE OF ONE OR MORE UNEXHAUSTED CLAIMS

A. The PLRA's Text and Structure Show No Intent by Congress to Depart from the "Fundamental Procedural Norm" that Only Non-Compliant Claims Should Be Dismissed from a Mixed Complaint Containing Both Compliant and Non-Compliant Claims

The "fundamental procedural norm * * * when a complaint has both good and bad claims, in the sense of claims that can and claims that cannot survive a motion to dismiss under Fed. R. Civ. P. 12(b)(6), [is that] only the bad claims are dismissed; the complaint as a whole is not." *Robinson v. Page*, 170 F.3d 747, 748-49 (CA7 1999) (Posner, C.J.); see also *Exxon Mobil Corp v. Allapattah Servs., Inc.*, 125 S.Ct. 2611, 2621 (2005) (rejecting "indivisibility" and "contamination" theories, under which jurisdictional defect for one claim or defendant would require entire action to be dismissed). Conceding the absence of any express command from Congress that a court should depart from this "fundamental procedural norm" in PLRA cases, see *Ross*, 365 F.3d at 1190 (CA10 2004) (acknowledging that the PLRA

only "suggests" a "total exhaustion" rule), the Sixth, Eighth, and Tenth Circuits have held that the presence of any unexhausted claim, including a claim that is exhausted as to some defendants but not as to others, contaminates the entire complaint and requires its dismissal in its entirety.[25] See *Jones Bey*, 407 F.3d at 805 (CA6); *Abdul-Muhammad v. Kempker*, 450 F.3d 350, 352 (CA8 2006); *Ross*, 365 F.3d at 1190 (CA10). A straightforward reading of the PLRA's text and structure, however, reveals that Congress carefully declined to impose any such rule.[26]

The primary justification offered by courts espousing the rule is that Congress' use of the word "action" in § 1997e(a)'s phrase "[n]o action shall be brought * * * until * * * administrative remedies * * * are exhausted" indicates that Congress intended that any action containing any unexhausted claims not be allowed to go forward. *Jones Bey v. Johnson*, 407 F.3d 801, 807 (CA6 2005), pet. for cert. pending, No. 05-874 (filed Jan. 9, 2006); *Ross*, 365 F.3d at 1190; *Graves v. Norris*, 218 F.3d 884, 885 (CA8 2000) (per curiam). But this asserted justification is a red herring. The only thing that § 1997e(a) establishes is what constitutes a non-compliant action; it does not say what a district court must do about it. In the absence of an actual instruction by Congress to dismiss partly exhausted actions, there is no basis for departing from the "fundamental procedural norm" to dismiss non-viable claims and allow the viable ones – in this instance, the exhausted

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[25] The Eighth Circuit's rule is somewhat tempered by its requirement that, after dismissing a mixed PLRA complaint, district courts must grant prisoners leave to amend their unexhausted claims. *Kozohorsky*, 332 F.3d at 1144.

[26] The PLRA's legislative history is entirely silent on the subject. *Ortiz*, 380 F.3d at 658.

ones – to go forward. Thus, the Sixth, Eighth, and Tenth Circuit's reliance on § 1997e(a) "to kill [a non-compliant complaint] rather than to cure it," reflects a flawed analytical leap without any support in the provision's language. *Ortiz v. McBride*, 380 F.3d 649, 657 (CA2 2004), cert. denied, 125 S.Ct. 1398 (2005).

The same conclusion follows from other relevant provisions of § 1997e. Two provisions, § 1997e(c)(1) and (2), deal specifically with dismissal, and that is "the place where we would expect to find guidance as to whether dismissal of 'mixed actions' is required." *Ortiz*, 380 F.3d at 657. Moreover, because § 1997e(c), like § 1997e(a), employs the term "action," the "'normal rule of statutory construction' that 'identical words used in different parts of the same act are intended to have the same meaning,'" requires that § 1997e(c) be consulted. *Gustafson v. Alloyd Co.*, 513 U.S. 561, 570 (1995) (quoting *Dep't of Revenue v. ACF Indus., Inc.*, 510 U.S. 332, 342 (1994)); see also *Nat'l Credit Union Admin. v. First Nat. Bank & Trust Co.*, 522 U.S. 479, 501 (1998) (applying the "established canon of construction that similar language within the same statutory section must be accorded a consistent meaning"); *Mertens v. Hewitt*, 508 U.S. 248, 260 (1993) ("[L]anguage used in one portion of a statute (§ 502(a)(3)) should be deemed to have the same meaning as the same language used elsewhere in the statute (§ 502(a)(5))."); 2A Singer, *supra*, § 47:16 ("Where the meaning of a word is unclear in one part of a statute but clear in another part, the clear meaning can be imparted to the unclear usage on the assumption that it means the same thing throughout the statute."). For three reasons, § 1997e(c) indicates that Congress did not intend to require district courts to dismiss an entire non-compliant action because the action contains one or more unexhausted claims.

First, neither § 1997e(c)(1) nor (2) requires dismissal of a prisoner's complaint in its entirety whenever it contains one or more unexhausted claims. See *Ortiz*, 380 F.3d at 657. ("Section 1997e(c) * * * is silent on the issue."). This Congressional silence is striking because, as discussed earlier (*supra* Part II(B)), Congress was plainly concerned with exhaustion when it enacted § 1997e. Section 1997e(a) is the mandatory exhaustion provision itself, and § 1997e(c)(2) specifically references a court's power to dismiss certain "claim[s] without first requiring exhaustion." Notably, although § 1997e(c)(1) delineates the circumstances under which a district court shall dismiss an entire "action," it fails to list partially unexhausted "actions" among them. It would have been no tall order for Congress, had it wished to impose a "total exhaustion" rule, to have stated in § 1997e(c)(1):

> The court shall on its own motion or on the motion of a party dismiss any action * * * if the court is satisfied that the action is frivolous, malicious, fails to state a claim upon which relief can be granted, * * * seeks monetary relief from a defendant who is immune from such relief, *or contains any unexhausted claims.*

But this is not what Congress said. Congress' omission indicates that no special rule regarding the treatment of partly unexhausted actions was intended. *Lira v. Herrera*, 427 F.3d 1164, 1172 (CA9 2005), petition for cert. pending, No. 05-878 (filed Jan. 6, 2006). To this end, "the most natural reading of § 1997e(c)(1) is that it simply restates the proposition that is implicit in Rule 12(b)(6), *i.e.*, if a claim is based on facts that provide no basis for granting relief by the court, the *claim* must be dismissed." *Shane v. Fauver*, 213 F.3d 113, 117 (CA3 2000); see also *Robinson*, 170 F.3d at 748-49.

Second, § 1997e(c)(2)'s reference to dismissal of unexhausted "claims," juxtaposed to § 1997e(c)(1)'s reference to dismissal of an "action," indicates that unexhausted claims can be treated independently, for dismissal purposes, from the action as a whole. "There would be little point in providing for the dismissal of some nonexhausted claims on the merits if the remainder of the action would then have to be dismissed, although exhausted, because of the failure to exhaust the dismissed claims." *Lira*, 427 F.3d at 1172.

Third, interpreting the word "action" in § 1997e(a) and (c)(1) to indicate that an exhaustion defect in any claim infects the suit as a whole "would 'render[] subsection (c)(2) superfluous.'" *Ibid.* (quoting *Jones Bey*, 407 F.3d at 811 (Clay, J., concurring in part and dissenting in part)). If § 1997e(a) demands dismissal of a mixed complaint because it uses the word "action," then § 1997e(c)(1), because it uses the word "action," must also require dismissal of the entire complaint if any claim is "frivolous, malicious, fails to state a claim upon which relief can be granted, or seeks monetary relief from a defendant who is immune from such relief." "Yet, § 1997e(c)(1) must apply only when *all* the claims meet the statutory standard for summary dismissal on the merits, not when only some of them do." *Ibid.*; see also *Jones Bey*, 407 F.3d at 811 (Clay, J., concurring in part and dissenting in part). Otherwise, § 1997e(c)(2), which contemplates the dismissal of individual "claims" that are "frivolous, malicious, fail[] to state a claim upon which relief can be granted, or seek[] monetary relief from a defendant who is immune from such relief," would be unnecessary. In other words, the inclusion of a single frivolous claim would "contaminate the entire action," mandating dismissal under § 1997e(c)(1). *Lira*, 427 F.3d at 1172. To read § 1997e(c)(1)'s use of the word "action" as precluding dismissal of individual defective

claims would, therefore, violate the rule against superfluities. See, e.g., *Hibbs*, 542 U.S. at 101; see also *supra* Part II(B) (discussing the rule against superfluities).

Section 1997e(e), which also expressly governs dismissal of certain PLRA "actions," reinforces that the Sixth, Eighth, and Tenth Circuits' construction of that term cannot prescribe dismissal of a mixed complaint. Section 1997e(e) provides: "No federal civil action may be brought by a prisoner confined in a jail, prison, or other correctional facility, for mental or emotional injury suffered while in custody without a prior showing of physical injury." Under the Sixth, Eighth, and Tenth Circuits' unitary approach to the term "action," dismissal of the entire case would be warranted. Notably, the courts of appeals have unanimously declined to interpret the phrase "no Federal civil action may be brought" in § 1997e(e) to impose a total compliance rule that would require dismissal of the entire complaint if even a single claim is defective.[27] See *Allah v. Al-Hafeez*, 226 F.3d 247, 250-52 (CA3 2000); *Calhoun v. Hargrove*, 312 F.3d 730, 734 (CA5 2002); *Robinson*, 170 F.3d at 748 (CA7); *Royal v. Kautzky*, 375 F.3d 720, 723 (CA8 2004); *Oliver v. Keller*, 289 F.3d

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[27] The courts of appeals have also repeatedly interpreted administrative exhaustion provisions in other statutes as requiring dismissal of only unexhausted claims in mixed complaints:

- ADA: *Marshall v. Fed. Express Corp.*, 130 F.3d 1095, 1098-99 (CADC 1997)
- FTCA: *Palay v. United States*, 349 F.3d 418, 425-27, 434 (CA7 2003)
- INA: *Abdulrahman v. Ashcroft*, 330 F.3d 587, 594-95 (CA3 2003)
- Title VII: *Patrick v. Henderson*, 255 F.3d 914, 916 (CA8 2001); *Butts v. City of New York Dep't of Hous. Pres. & Dev.*, 990 F.2d 1397, 1401 (CA2 1993).

623, 629-30 (CA9 2002); *Searles v. Van Bebber*, 251 F.3d 869, 876, 881 (CA10 2001).

In sum, neither the text of § 1997e(a) nor the use of the term "action" elsewhere in the PLRA supports interpreting § 1997e(a) as dictating the Sixth, Eighth, and Tenth Circuits' "total exhaustion" rule. Although § 1997e(a)'s use of the term "action" "may seem ambiguous in isolation," its meaning is "clarified by the remainder of the statutory scheme," *viz.*, § 1997e(c) and (e), "because only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law." *United Sav. Ass'n of Tex. v. Timbers of Inwood Forest Assocs., Ltd.*, 484 U.S. 365, 371 (1988) (citation omitted). Thus, while "action" in the PLRA refers to the case as a whole, the statute consistently uses the term in a manner that contemplates dismissing an entire action only if the entire action fails to meet statutory standards. *Lira*, 427 F.3d at 1173. When some claims are valid and others are not, the usual procedural norm – that when a complaint has both good and bad claims, only the bad claims are dismissed – should prevail. And, as Judge Posner recognized in *Robinson*, "[i]f Congress meant to depart from this norm, we would expect some indication of that, and we find none." 170 F.3d at 749.

B. The Habeas Corpus "Total Exhaustion" Rule Does Not Support a PLRA "Total Exhaustion" Rule, and Certainly Not the Harsher Rule Prescribed by the Sixth and Tenth Circuits

In adopting their "total exhaustion" rule, the Sixth and Tenth Circuits reasoned alternatively that this Court's adoption of a "total exhaustion" rule in the habeas context in *Rose v. Lundy* justified adoption of a similar rule in the

PLRA context. *Jones Bey*, 407 F.3d at 808 ("Because we recognize the correlation between habeas petitions and § 1983 actions, we find it appropriate to interpret the PLRA exhaustion requirement in light of habeas corpus rules."); *Ross*, 365 F.3d at 1189-90 (discussing *Rose* and adopting the "total exhaustion" rule in the PLRA context).

Drawing on habeas corpus law is unnecessary because the PLRA's text and structure are sufficient to resolve the relevant questions. *Lira*, 427 F.3d at 1173. Further, although the Court's opinion in *Ngo* defining the statutory term "exhausted" was "inform[ed]" by habeas law, 126 S.Ct. at 2393 (Breyer, J., concurring), there are significant differences between habeas proceedings and prison civil rights litigation that make adoption of the judge-made habeas "total exhaustion" rule inapposite. See *Muhammad v. Close*, 540 U.S. 749, 751 (2004) ("Federal petitions for habeas corpus may be granted only after other avenues of relief have been exhausted. Prisoners suing under § 1983, in contrast, generally face a substantially lower gate, even with the requirement of the Prison Litigation Reform Act of 1995 that administrative opportunities be exhausted first." (citations omitted)).

First, *Rose* created a habeas "total exhaustion" rule admittedly for policy reasons because the applicable habeas statute did not address the question what to do with mixed petitions. 455 U.S. at 516-17 (analyzing the "policies underlying the statutory provision to determine its proper scope" when the text found to be ambiguous). Because the PLRA's language and structure are sufficient to resolve the "determinative" question whether Congress intended a "total exhaustion" rule, policy considerations are inappropriate "no matter how desirable that might be." *Alexander*, 532 U.S. at 286-87.

Second, in *Rose*, the Court explained that the policy underlying the exhaustion requirement in habeas corpus

law is federal-state comity. *Rose*, 455 U.S. at 515 ("[A]s a matter of comity, federal courts should not consider a claim in a habeas corpus petition until after the state courts have had an opportunity to act."). The Court reasoned that "a total exhaustion rule promotes comity and does not necessarily impair the prisoner's right to relief." *Id.* at 521. The concerns of comity between the judicial systems of coordinate sovereigns are simply not applicable either to the substance of complaints about prison conditions or to the kinds of informal, not-even-quasi-judicial administrative procedures that are most typical in the Nation's prisons and jails for resolving grievances that cover topics from food to medical care to religion to discipline. The federal courts in prison civil rights cases do not re-examine questions that have already been presented to the state judiciary and potentially overturn the state judiciary's judgments as they do in habeas proceedings. Indeed, the Court has recognized that challenges to the conditions of confinement do not raise the same comity concerns that challenges to the fact or duration of confinement raise. *Wilkinson v. Dotson*, 125 S.Ct. 1242, 1249 (2005) (rejecting argument that permitting prisoner's § 1983 lawsuit without prior exhaustion of state-court remedies would compromise principles of federal-state comity).

Finally, the remaining rationale for the adoption of the "total exhaustion" rule in the habeas context was that "federal claims that have been fully exhausted in state courts will more often be accompanied by a complete factual record to aid the federal courts in their review." *Rose*, 455 U.S. at 518-19. In civil rights cases, there is no analogous requirement that federal courts defer to the findings or legal conclusions of prison grievance administrators. Moreover, this Court has previously noted that

prison administrative hearings often will not yield a useful factual record:

> The prisoner was to be afforded neither a lawyer nor an independent nonstaff representative. There was no right to compel the attendance of witnesses or to cross-examine. There was no right to discovery. There was no cognizable burden of proof. No verbatim transcript was afforded. Information presented often was hearsay or self-serving. The committee members were not truly independent. In sum, the members had no identification with the judicial process of the kind and depth that has occasioned absolute immunity.

Cleavinger, 474 U.S. at 206.[28] None of the rationales underlying a "total exhaustion" rule in the habeas context apply in the PLRA context.

Further, there is a significant functional difference between habeas proceedings and civil litigation that makes any habeas analogy especially inapposite to the PLRA in the present context. "Total exhaustion" in habeas makes sense because habeas proceedings are ultimately about one thing: the criminal judgment keeping the prisoner in custody. See *Wainwright v. Sykes*, 433 U.S. 72, 90 (1977) (holding that enforcing state procedural requirements is essential because "the state criminal process should be the 'main event' rather than a 'tryout on the road' to a dispositive federal habeas hearing."). Accordingly, it makes sense to address all challenges to that

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[28] *Ngo* is not the contrary. *Ngo* simply cited *McCarthy* for the proposition that "'exhaustion of the administrative procedure *may* produce a useful record for subsequent judicial consideration.'" 126 S.Ct. at 2385 (quoting *McCarthy*, 503 U.S. at 145) (emphasis added). The terse denials of petitioners' grievances and appeals contained in the Joint Appendix confirm the *de minimis* utility of the administrative records created by prison grievance procedures.

judgment together, and – as a matter of comity as well as efficiency and common sense – to subject the state judiciary's judgment to federal scrutiny only once. The same is not true of prison civil rights litigation, where separate claims do not necessarily stand or fall together even if there is some factual overlap and where the long-established rule is permissive joinder under the Federal Rules of Civil Procedure. See Fed. R. Civ. P. 18(a), 20(a); *Lira*, 427 F.3d at 1174 ("Which claims are joined in a given PLRA lawsuit * * * is largely up to the plaintiff" unlike "the habeas context, where a single conviction is at issue"); *Ortiz*, 380 F.3d at 661 ("[S]ection 2254 applications are usually about a singular event – the petitioner's conviction in state court," whereas "section 1983 actions, by contrast, routinely seek to address more than one grievance – sometimes a laundry list of grievances – relating to different events or circumstances"). Thus, the Sixth and Tenth Circuit's concerns about "piecemeal litigation," *Jones Bey*, 407 F.3d at 808; *Ross*, 365 F.3d at 1190, while important to allow federal habeas courts to review the prisoner's underlying conviction in one sitting, *Rose*, 455 U.S. at 520, are largely irrelevant here.

There is another key distinction that the Sixth and Tenth Circuits overlooked in adopting a "total exhaustion" rule in reliance on habeas law. Because there was no statute of limitations for the filing of habeas corpus petitions when *Rose* was decided in 1983, the "total exhaustion" rule did not threaten to extinguish a prisoner's right to bring a habeas corpus petition. At most, it would *delay* a federal court's adjudication of a prisoner's exhausted claims while the prisoner litigated the unexhausted claims through the state court system (or, alternatively, filed a new federal petition containing only the exhausted claims). In contrast, § 1983 claims are subject to statutes of limitations. *City of Rancho Palos*

Verdes, California v. Abrams, 125 S.Ct. 1453, 1460 n.5 (2005) ("The statute of limitations for a § 1983 claim is generally the applicable state-law period for personal-injury torts."). Thus, the dismissal of an exhausted § 1983 claim, simply because it is presented along with an unexhausted claim, could effectively *bar* a meritorious civil rights claim forever.

This Court previously has recognized the significance of a statute of limitations in its analysis of the "total exhaustion" rule. In 1996, thirteen years after *Rose* was decided, Congress passed the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 124 (1996), which imposed a one-year statute of limitations for federal habeas petitions (which is tolled during the pendency of a state habeas petition). In *Rhines v. Weber*, 125 S.Ct. 1528 (2005), the Court examined the habeas "total exhaustion" requirement for the first time since the passage of the AEDPA. The Court expressly noted the effect of a statute of limitations on the "total exhaustion" rule:

> As a result of the interplay between AEDPA's 1-year statute of limitations and [*Rose*]'s dismissal requirement, petitioners who come to federal court with 'mixed' petitions run the risk of forever losing their opportunity for any federal review of their unexhausted claims.

Id. at 1533. The Court held that if a prisoner had good cause for failing to exhaust a potentially meritorious claim, the petitioner's interest in obtaining federal review of his claims outweighs the competing interests, such that it would be an abuse of discretion to apply the "total exhaustion" rule and dismiss a mixed petition. *Id.* at 1535.

The interplay between the rigid without leave to amend "total exhaustion" rule applied in the Sixth and Tenth Circuits and the statute of limitations applicable to

§ 1983 claims would have the same results recognized by the Court in *Rhines*: It would force prisoners to "run the risk of forever losing their opportunity for any federal review" of their civil rights claims. *Rhines*, 125 S.Ct. at 1533; see also *Lira*, 427 F.3d at 1175 ("[D]ismissal of the action for lack of total exhaustion could result in an inability to pursue the *exhausted* claim, because of a statute of limitations barrier.").

Finally, despite its purported reliance on habeas law, the court of appeals in these cases inexplicably applied a "total exhaustion" rule considerably harsher than the habeas rule. *Rose* expressly held that a habeas petitioner "can always amend the petition to delete unexhausted claims." 455 U.S. at 520. There is nothing in habeas law (or, as we show above, anywhere else) to support the proposition that civil rights litigants, unlike habeas petitioners, should be denied this option. Moreover, *Rhines* modified the *Rose* rule to allow district courts to stay habeas petitions containing both exhausted and unexhausted claims to allow petitioners to exhaust their unexhausted claims in state court without having to re-file and face a possible statute of limitations bar.[29] 125 S.Ct. at

[29] The overwhelming majority of unexhausted claims that would be severed and stayed – should the Court apply *Rhines* to the PLRA – would not come back exhausted because a grievance filed at that point would likely be untimely. See *Ortiz*, 380 F.3d at 663. This is particularly true after *Ngo*'s endorsement of a procedural default rule. After *Ngo*, the only unexhausted claims that may come back are those (1) brought by prisoners incarcerated in a rare jurisdiction, like North Carolina, with a sufficiently long deadline for filing grievances, see North Carolina Dep't of Corr., *Rules and Policies Inmate Booklet*, § 20(6)(a) (Mar. 2002), *available at* http://www.doc.state.nc.us/Publications/inmate%20rule%20book.pdf (one-year grievance deadline), such that the prisoner may return to the grievance process and exhaust the dismissed claim before returning to court, or (2) brought by prisoners incarcerated in institutions with shorter deadlines for filing grievances but where

(Continued on following page)

1535. Thus, the Sixth and Tenth Circuits' habeas analogy "does not support the inflexible total exhaustion-dismissal rule" that the court of appeals applied. *Lira*, 427 F.3d at 1173 n.10.

C. No Other Policy Considerations Justify a "Total Exhaustion" Rule

The Sixth and Tenth Circuits also attempted to defend their "total exhaustion" rule on policy grounds that they believe further the PLRA's purposes. Even if this Court were to take policy considerations into account – which, as we note above, see *supra* Parts I, II(F), IV(B), it should not – such considerations support rejection – rather than endorsement – of the Sixth and Tenth Circuit's "total exhaustion" rule.

The Sixth and Tenth Circuits' "total exhaustion" rule does not advance the goal of "improv[ing] the quality of prisoner suits," *Porter*, 534 U.S. at 524, because, like all of the Sixth Circuit's procedural rules at issue in these cases, it falls equally on meritorious and non-meritorious claims by punishing the technical mistakes of unsophisticated prisoners at either the administrative grievance or federal court pleading stages.[30] Nor does the Sixth and Tenth Circuits' "total exhaustion" rule necessarily "reduce the

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prison officials will excuse the prisoner's untimeliness, see Kermit Roosevelt III, *Exhaustion Under the Prison Litigation Reform Act: The Consequence of Procedural Error*, 52 Emory L.J. 1771, 1810 & n.192 (2003) (observing that most grievance systems give administrators the discretion to hear procedurally noncompliant grievances). Nonetheless, if the Court were to analogize to habeas in crafting a total exhaustion rule, the Court should not cut off the possibility that some prisoners may be able to resuscitate their unexhausted claims.

[30] Whenever a court dismisses a prisoner's complaint for failure to comply with an extra-statutory technicality, the PLRA's unforgiving filing fee provisions (see *supra* Part II(F)) render the dismissal punitive.

quantity * * * of prisoner suits." *Ibid.* Instead, it "tends to increase, rather than to alleviate, the caseload burdens on * * * federal courts." *Rose*, 455 U.S. at 522 (Blackmun, J., concurring in judgment). The "total exhaustion" rule "create[s] an incentive for prisoners to file section 1983 claims, if they have more than one, in more than one lawsuit." *Ortiz*, 380 F.3d at 658. A prisoner who has already filed a non-compliant mixed complaint and had it dismissed may often re-file, including in his second suit only his properly exhausted claims. *Lira*, 427 F.3d at 1174; see also *Ortiz*, 380 F.3d at 658. To the extent that the prisoner is still able to exhaust his unexhausted claims (see *supra* note 29), he may later file yet another suit containing his newly-exhausted claims. *Lira*, 427 F.3d at 1174; see also *Jones Bey*, 407 F.3d at 811-12 (Clay, J., concurring in part and dissenting in part). To this end, the Sixth and Tenth Circuits' "total exhaustion" rule promotes "the precise inefficiency the PLRA was designed to avoid – requiring courts to docket, assign, and process [at least] two cases where one would do." *Lira*, 427 F.3d at 1174; see also *Ortiz*, 380 F.3d at 659.

The "total exhaustion" rule does not advance the purpose to "afford corrections officials time and opportunity to address complaints internally" before suit is filed, *Porter*, 534 U.S. at 524-25, any more than a claim exhaustion rule does. Under either rule, a court will not consider a prisoner's claim that was not first properly exhausted. Whatever interest Congress had in encouraging prisoners to exhaust the grievance process is already protected by a rule requiring courts to dismiss those *claims* that the prison had no opportunity to review. Since there is no risk of a prisoner using "the exhaustion of one claim as a hook to have many exhausted claims considered in a federal civil rights action, adoption of a total exhaustion-dismissal rule would do nothing to advance Congress's policy goals."

Lira, 427 F.3d at 1175 (internal quotation marks and citation omitted). Similarly, a "total exhaustion" rule would not prospectively "encourage prisoners to make full use of inmate grievance procedures" for future claims. *Ross*, 365 F.3d at 1189. Under the procedural default rule endorsed by this Court in *Ngo*, prisoners already have a powerful incentive to promptly and properly exhaust all of their claims because, except in rare instances, they will not be able to resuscitate their stale claims later. See *supra* note 29.

A "total exhaustion" rule also fosters judicial inefficiency. PLRA actions – like any action requiring administrative exhaustion – may present genuine and challenging exhaustion questions. In such a case, a district court must first familiarize itself with the case and hear the positions of the parties. Under the Sixth and Tenth Circuits' "total exhaustion" rule, the presence of one unexhausted claim would require dismissal of the entire action only to have the same case – absent the unexhausted claims – re-filed, re-heard on the exhausted issues, and decided. Petitioner Williams' case demonstrates this inefficiency. Applying its "total exhaustion" rule, the Sixth Circuit required dismissal of both of Williams' unrelated claims even though there is no dispute that Williams exhausted his single-occupancy cell claim. Critically, however, the dismissal of both of Williams' claims to allow him to try to exhaust his denial of surgery claim will do nothing to assist the lower courts in addressing Williams' single-occupancy cell claim because that claim has already been fully exhausted and an administrative record has already been fully developed. See *Lira*, 427 F.3d at 1174 ("[E]xhausting one of these causes of action would not help satisfy the plaintiff, weed out frivolous complaints, or develop an administrative record with respect to the other [claims], entirely separate matters."). This inefficiency is likely even greater where

the prisoner's exhausted and unexhausted claims are factually interrelated because, in such a case, "the district court is * * * required to familiarize itself with the same factual background of the case twice." *Ortiz*, 380 F.3d at 659; see also *Rose*, 455 U.S. at 527-28 (Blackmun, J., concurring in judgment) (recognizing that "[i]n many cases a decision on the merits [of an exhausted claim] will involve only negligible additional effort," whereas requiring a prisoner to re-file his petition would result in "duplicative examination of the record and consideration of the exhausted claims – perhaps by another district judge").

CONCLUSION

The judgments of the court of appeals should be reversed.

Respectfully submitted,

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STATUTORY APPENDIX

1. 28 U.S.C. 1915A provides, in relevant part:

(a) Screening. The court shall review, before docketing, if feasible or, in any event, as soon as practicable after docketing, a complaint in a civil action in which a prisoner seeks redress from a governmental entity or officer or employee of a governmental entity.

(b) Grounds for dismissal. On review, the court shall identify cognizable claims or dismiss the complaint, or any portion of the complaint, if the complaint –

(1) is frivolous, malicious, or fails to state a claim upon which relief may be granted; or

(2) seeks monetary relief from a defendant who is immune from such relief.

2. 42 U.S.C. 1997e provides, in relevant part:

(a) Applicability of administrative remedies

No action shall be brought with respect to prison conditions under section 1979 of the Revised Statutes of the United States (42 USC § 1983), or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted.

* * *

(c) Dismissal

(1) The court shall on its own motion or on the motion of a party dismiss any action brought with respect to prison conditions under section 1979 of the Revised Statutes of the United States (42 USC § 1983), or any other Federal law, by a

prisoner confined in any jail, prison, or other correctional facility if the court is satisfied that the action is frivolous, malicious, fails to state a claim upon which relief can be granted, or seeks monetary relief from a defendant who is immune from such relief.

(2) In the event that a claim is, on its face, frivolous, malicious, fails to state a claim upon which relief can be granted, or seeks monetary relief from a defendant who is immune from such relief, the court may dismiss the underlying claim without first requiring the exhaustion of administrative remedies.

* * *

(e) Limitation on recovery

No Federal civil action may be brought by a prisoner confined in a jail, prison, or other correctional facility, for mental or emotional injury suffered while in custody without a prior showing of physical injury.